

Missouri Attorney General's Opinions - 1981

Opinion	Date	Topic	Summary
1-81	Jan 27		Opinion letter to The Honorable James F. Antonio
2-81	Jan 26		Opinion letter to Mr. J. H. Frappier
5-81	Oct 22		Opinion letter to Barrett A. Toan
6-81	Feb 3	SOLDIERS.	Depreciation is to be considered as an operating cost when calculating the average per capita cost of each type of care provided for residents of the Missouri Veteran's Home, pursuant to Section 42.110, RSMo 1978, and that depreciation also is to be included in determining the actual cost of care for such residents pursuant to the above statute.
7-81	Sept 28		Opinion letter to Dr. James Frank
10-81			Withdrawn
12-81	June 10	HOSPITALS. COUNTY HOSPITALS. COURT COSTS. CIVIL COSTS.	A filing fee is not required in an action brought on behalf of a county hospital organized under the provisions of § 205.160 for the collection of an overdue account.
13-81			Withdrawn
16-81	Feb 5	CRIMINAL LAW. CRIMINAL PROCEDURE. DEPARTMENT OF SOCIAL SERVICES.	A defendant receiving concurrent sentences on offenses committed both before and after the enactment of the present criminal code, can be held in prison beyond his conditional release date on the code sentence until he is granted release on the 7/12ths date on the pre-code sentence. However, the conditional release term should continue to run simultaneously with any periods of incarceration on the longer concurrent pre-code sentence.
17-81	Feb 5	CRIMINAL LAW. CRIMINAL PROCEDURE. DEPARTMENT OF SOCIAL SERVICES.	If a defendant is sentenced to serve concurrent sentences of unequal length under the present criminal code, he must have the shorter sentence run continuously with the longer sentence. The conditional release term on the shorter sentence should continue to run during the prison term on the longer sentence.
18-81			Withdrawn
20-81	Jan 7		Opinion letter to The Honorable William C. McIlroy
21-81	Jan 15	SOCIAL SECURITY. PROSECUTING ATTORNEYS. ASSISTANT	Counties where assistant prosecutors are employed under § 56.700, RSMo Supp. 1980, are responsible for the employer's share of social security taxes and for fringe benefits provided to other county employees.

		PROSECUTING ATTORNEYS.	
22-81	Jan 28	CITIES, TOWNS, AND VILLAGES. CITY COUNCIL. CITY OFFICERS. COMPENSATION. CONSTITUTIONAL LAW.	After a municipal election, the city council of a fourth class city must meet as soon as the results of the election can be declared, declare and certify such results, and allow the aldermen-elect to take office upon their taking the oath and qualifying. Such city has no authority to delay the aldermen-elect from taking office by ordinance provision delaying such date. A compensation increase passed with respect to such board of aldermen after the election and prior to the date the new aldermen take office to take effect when the new board of aldermen take office does not increase the compensation on that date of either the alderman-elect who was not previously an incumbent, the aldermen-elect who were incumbents, or the incumbents who were not up for election.
25-81	May 18	PEACE OFFICERS. JUVENILE OFFICERS.	Juvenile officers do not fall within the definition of peace officers as provided by Section 590.100(2), RSMo.
27-81			Withdrawn
29-81	June 10		Opinion letter to The Honorable Gary E. Stevenson
31-81	Apr 28	MENTAL HEALTH.	In considering §§ 205.975 through 205.990, RSMo, in their entirety, before any entities can receive community mental health fund moneys levied and collected by counties under §§ 205.975 through 205.990, the entities are required to be designated by the Department of Mental Health in the state plan as providers of comprehensive mental health services in the catchment areas where the entities are located.
32-81	Feb 4		Opinion letter to The Honorable Edward D. Daniel
34-81	Feb 27		Opinion letter to The Honorable Estil Fretwell
35-81	Oct 2	DEPARTMENT OF PUBLIC SAFETY. TORT DEFENSE FUND. ADJUTANT GENERAL.	The Tort Defense Fund does not extend generally to the officers, agents, employees and members of the Office of the Adjutant General, to those in the Disaster Planning and Operations Office, or to those in the Office of Air Search and Rescue except to the extent that individuals so employed are the Adjutant General or members of the Missouri National Guard.
36-81	Feb 20		Opinion letter to The Honorable George E. Murray
37-81	Sept 17		Opinion letter to The Honorable Truman E. Wilson
39-81	Jan 29	LIBRARIES.	Under the terms of § 137.073.3, RSMo Supp. 1980, if a library district is on a calendar year and the assessed valuation of real or real and personal property combined within the district has increased by ten

			percent or more over the prior year's valuation by action other than general reassessment, the tax rate set in 1980 must be lowered to the extent necessary to produce substantially the same amount of tax revenue as estimated in the library district's 1980 annual budget.
40-81	Nov 16	STATE EMPLOYEES' RETIREMENT SYSTEM. MEDICAL CARE PLAN. HEALTH INSURANCE AND ACCIDENT INSURANCE.	The Board of Trustees of the Missouri State Employees' Retirement System has authority under the provisions of § 104.515, RSMo Supp. 1980, to include in any health benefits plan offered to its members the option of membership in a health maintenance organization organized under Chapter 354, RSMo 1978, and the Missouri State Employees' Retirement System must offer its members the option of membership in a qualified health maintenance organization, where twenty-five (25) or more system members reside in that HMO's service area.
43-81	June 26	RETIREMENT. STATE EMPLOYEES' RETIREMENT SYSTEM.	Under §§ 104.310, et seq., as amended by House Committee Substitute for House Bills Nos. 835, 53, 591 and 830 of the 81st General Assembly, if the employee does not use his accrued annual leave while he is an employee, and accrued annual leave is paid as a lump sum on the payroll for the employee's last month of work, the accrued annual leave is excluded from calculations of average final compensation and creditable service. Retirement benefits then commence the day after the last day worked.
45-81	Jan 13	CITIES, TOWNS, AND VILLAGES.	Section 71.015, SSHB No. 1110, 80th General Assembly, is not applicable to cities, towns, or villages located in first class charter counties. The provisions of § 71.860, RSMo, refer to repealed § 71.015, RSMo 1978, which still applies to cities, towns, or villages in first class charter counties.
47-81	Feb 19		Opinion letter to Mr. Joseph Frappier
49-81	Jan 8		Opinion letter to The Honorable Emory Melton
50-81	Mar 2		Opinion letter to Senator Edwin L. Dirck
51-81	Sept 21		Opinion letter to The Honorable Samuel C. Jones
52-81	Jan 23	INSURANCE.	Premiums received by an insurer under a policy or contract issued in connection with qualified or except annuities under the Missouri deferred compensation program are excluded from the premium tax under the provisions of § 148.390, RSMo 1978.
53-81	June 8		Opinion letter to The Honorable Kenneth L. Oswald
60-81	Jan 30	CONSTITUTIONAL LAW. STATE MONIES. CRIMINAL	It is within the power of the general assembly to pass substantive legislation aiding crime victims and to appropriate money therefor from general revenue. The general assembly also has the power to pass general legislation compensating crime victims from the

		PROCEDURE.	proceeds of a pool of money originating from a surcharge on court costs and to require a defendant as part of his criminal punishment to compensate his victim.
61-81	Jan 9		Opinion letter to The Honorable John A. Birch
63-81 Addendum	Jan 14		Opinion letter to The Honorable Morris Westfall
64-81	Apr 3		Opinion letter to Mr. W. David Blackwell
65-81	Feb 2	CITIES, TOWNS, AND VILLAGES. CITY COUNCIL. CITY ORDINANCES.	Under the holding of <u>State ex rel. Stewart v. King, 562 S.W. 2d 704 (Mo. App., K.C.D. 1978), an alderman of a fourth class city who abstains from voting, under § 79.130, RSMo, does not have his abstention counted as a vote.</u>
66-81			Withdrawn
67-81	Mar 12		Opinion letter to Mr. Fred A. Lafser
68-81	Jan 16		Opinion letter to The Honorable Kaye Steinmetz
69-81			Withdrawn
71-81	Mar 13	EMPLOYMENT COMPENSATION. CONSTITUTIONAL LAW. STATE REVENUES.	Only such sums as are expended from the unemployment compensation fund for payment of administrative expenses pursuant to an appropriation by the legislature are properly includable in the definition of total state revenues found in Section 17, Article X of the Missouri Constitution.
72-81	May 6	SCHOOLS. DEPOSITARIES. SCHOOL DISTRICTS.	Local school districts are not required to bid depositaries in accordance with the provisions of Chapter 165, RSMo, because it is "unlawful" for a banking institution to pay interest upon demand deposits.
73-81	Apr 2	MERIT SYSTEM. STATE EMPLOYEES. REORGANIZATION ACT.	Division directors of the Department of Social Services may designate only one exempt assistant pursuant to § 36.030.1(1), RSMo Supp. 1980.
76-81	June 9		Opinion letter to The Honorable James R. Strong
77-81	Mar 20		Opinion letter to The Honorable Jerry E. McBride
80-81	Mar 5		Opinion letter to Dr. James F. Antonio
84-81	Feb 25		Opinion letter to The Honorable Fred Lynn
85-81	Mar 11		Opinion letter to The Honorable Harold L. Lowenstein
86-81	May 27	SHERIFFS. COUNTIES.	A contract entered into with the United States Secretary of the Army under § 57.109, RSMo Supp. 1980, for special law enforcement

		COUNTY COURT.	services by a sheriff must have the approval of the county court. The sheriff does not receive any additional compensation for the performance of such services, although the contract may contain provisions for direct reimbursement of mileage expense for the sheriff or his deputies using personal vehicles.
87-81	Feb 24	EMPLOYMENT SECURITY.	The half percent increase in the employer's contribution to the unemployment compensation fund under § 288.123, RSMo Supp. 1980, is effective for the quarter following the ensuing quarter after any quarter in which the cash balance in the unemployment fund on any day is below 150 million dollars, but is not a cumulative increase.
88-81	Mar 3		Opinion letter to The Honorable Gary D. Sharpe
89-81	June 8		Opinion letter to The Honorable William R. O'Toole
90-81	Mar 23		Opinion letter to The Honorable Lester Patterson
91-81	Mar 6		Opinion letter to The Honorable Robert B. Langworthy
92-81	June 16		Opinion letter to The Honorable Paul Bradshaw
93-81	Mar 4		Opinion letter to Mr. Fred A. Lafser
94-81	Mar 10		Opinion letter to The Honorable Al Nilges
96-81			Withdrawn
97-81	Mar 6		Opinion letter to Dr. Arthur L. Mallory
98-81	Mar 30		Opinion letter to The Honorable Fred B. Brummel
99-81	Mar 17		Opinion letter to The Honorable Travis Morrison
102-81	Mar 24		Opinion letter to The Honorable Steve Vossmeier
104-81	May 13	HANCOCK AMENDMENT. TAXATION (MERCHANTS & MANUFACTURERS).	The change by the St. Louis County Board of Equalization in the formula for calculation of the merchants' and manufacturers' tax does not constitute an increase in the levy of an existing tax or the imposition of a new tax and need not, therefore, be submitted for voter approval according to the Hancock Amendment.
106-81	May 14		Opinion letter to The Honorable Gary E. Stevenson
107-81	June 26		Opinion letter to The Honorable Kenneth L. Oswald
108-81	Apr 27	ASSESSMENTS. INTEREST. COUNTIES.	Interest collected on the assessment fund of the county under § 137.720 and § 137.750, RSMo Supp. 1980, goes into such fund and is not to be paid into county general revenue.
109-81			Withdrawn

<u>113-81</u>	Apr 20		Opinion letter to The Honorable Paul L. Bradshaw
<u>115-81</u>	July 9	ASSESSMENTS. REASSESSMENT. HANCOCK AMENDMENT. CONSTITUTIONAL LAW. STATE TAX COMMISSION.	With regard to the statewide reassessment currently in process the "state financed proportion" required to be maintained according to the Hancock Amendment (Art. X, § 21) is to be measured by the percentages set forth in § 137.750, RSMo Supp. 1980, and that accordingly, the state is responsible for reimbursement to the counties based upon the application of those percentages to actual approved expenses incurred in each county of the state.
<u>116-81</u>	May 1		Opinion letter to The Honorable John G. Meyer
<u>119-81</u>	May 4		Opinion letter to The Honorable David Doctorian
<u>120-81</u>	Apr 30		Opinion letter to The Honorable Joe Moseley
<u>122-81</u>	Apr 22		Opinion letter to The Honorable Larry E. Mead
123-81			Withdrawn
<u>124-81</u>	May 1	HANCOCK AMENDMENT. CONSTITUTIONAL LAW.	The charges imposed by the Board of Public Works of the city of Fulton for electricity and natural gas consumption do not constitute any type of tax, license, or fee within the meaning of Art. X, § 22, Mo. Constitution, and that increases in those charges do not, therefore, depend for their validity upon voter approval prior to imposition.
125-81			Withdrawn
<u>126-81</u>	May 7		Opinion letter to The Honorable James F. Antonio
<u>128-81</u>	Dec 31	LAND RECLAMATION COMMISSION. STATE CONTRACTS. STATE PURCHASES.	The Land Reclamation Commission in implementing the Surface Coal Mining Law, Sections 444.800 to 444.940, RSMo Supp. 1981 , is subject to requirements of the Purchasing Law, Chapter 34, RSMo 1978.
<u>129-81</u>	Sept 25		Opinion letter to The Honorable Stephen C. Bradford
<u>130-81</u>	July 1		Opinion letter to The Honorable Estil Fretwell
<u>132-81</u>	Dec 24		Opinion letter to The Honorable Lester R. Patterson
135-81			Withdrawn
<u>136-81</u>	June 22		Opinion letter to The Honorable Larry E. Mead
<u>137-81</u>	Oct 7		Opinion letter to The Honorable Phil Snowden
<u>139-81</u>	Sept 28		Opinion letter to The Honorable Jerry E. McBride
<u>145-81</u>	July 8		Opinion letter to The Honorable John A. Birch

153-81	Dec 31	ACCIDENT REPORTS. JUVENILES. PEACE OFFICERS AND PEACE OFFICERS' RECORDS. TRAFFIC OFFENSES. TRAFFIC VIOLATIONS.	Peace officers, upon request : (1) must release the names of juveniles involved in traffic accidents when such juveniles are not alleged to have violated any state or municipal traffic ordinances or regulations in connection with such accidents; (2) must release the names of sixteen-year-old juveniles who are alleged to have violated non-felony state or municipal traffic ordinances or regulations in connection with a traffic accident; (3) may not release the names of juveniles who are alleged to have violated state or municipal traffic ordinances or regulations the violations of which are felonies; (4) may not release the names of juveniles under the age of sixteen who are alleged to have violated state or municipal traffic ordinances or violations; and (5) consistent with this opinion's holding on the release of names, must release other pertinent information concerning a traffic accident to inquiring parties.
158-81	Dec 3	SOIL AND WATER DISTRICTS COMMISSION. REORGANIZATION ACT. GOVERNOR. DEPARTMENT OF NATURAL RESOURCES.	Members of State Soil and Water Districts Commission are to be appointed pursuant to Section 10.4 of Reorganization Act.
159-81	July 24		Opinion letter to The Honorable Orvey C. Buck
160-81	Aug 18	CIRCUIT CLERKS. DEPUTY CIRCUIT CLERKS. STATE EMPLOYEES' RETIREMENT SYSTEM.	1. A person who was a deputy circuit clerk in the City of St. Louis on June 30 1981 and who became a state employee the next day is a member of the Missouri State Employees' Retirement System and entitled to creditable prior service for all service rendered to the City of St. Louis if the individual complies with the provisions of paragraphs (a), (b), (c) and (d) of § 104.345.3(1) of House Committee Substitute for House Bills Nos. 835, 53, 591 and 830 of the 81st General Assembly. 2. The allowance for creditable prior service provided for in House Bills Nos. 835, 53, 591 and 830 of the 81st General Assembly, for deputy

			circuit clerks of the City of St. Louis is not contingent upon the City of St. Louis Retirement System consenting to the transfer of funds.
163-81	Aug 18		Opinion letter to The Honorable John Schneider
167-81	Dec 21	TEACHERS. TEACHER EMPLOYMENT. SCHOOL DISTRICTS.	Under Section 168.221, a metropolitan school district (1) is not required to give a probationary teacher any reason for nonretention of the teacher for the subsequent school year, and (2) is not required to give a probationary teacher whose work has been determined unsatisfactory in March of a given year a statement of the reason or reasons for nonretention or a written statement setting forth the nature of the teacher's incompetency, or to allow the teacher a period of one semester within which to improve.
168-81	Oct 2		The fees and revenues of MHDC are not subject to constitutional and statutory mandates that all state revenue and other moneys from any source whatsoever be deposited in the state treasury and that the MHDC fees and revenues are not subject to appropriation by the General Assembly.
170-81	Oct 8		Opinion Letter to The Honorable Kaye Steinmetz
175-81	Dec 24	DEPARTMENT OF PUBLIC SAFETY. LIQUOR. LICENSES.	The supervisor of the Division of Liquor Control may not issue a license for the sale of light wines not in excess of fourteen percent by weight by the drink at retail for consumption on the premises where sold in cities under 20,000 inhabitants or unincorporated areas outside the city limits unless a majority of the qualified voters of said city have authorized him to do so. The supervisor of the Division of Liquor Control retains his statutory discretion to issue a license for sale by the drink at retail for consumption on the premises where sold of light wines not in excess of fourteen percent in cities and unincorporated areas not within the purview of Section 311.090.
177-81	Dec 17	WORKERS' COMPENSATION. CRIME VICTIMS.	The Workers' Compensation Fund, Section 287.710, may not be expended for salaries and expenses relating to the administration of Chapter 595, pertaining to crime victims.
178-81	Dec 17	CONFLICT OF INTEREST. PRESIDING JUDGE COUNTY COURT. SCHOOL BOARDS. SCHOOL CONTRACTS.	Presiding judge of county court is not a regular member of school board under Section 162.301.3, RSMo Supp. 1981 , and, therefore, Section 105.458, RSMo, is not applicable to presiding judge.
180-81	Dec 28		Opinion letter to The Honorable Jack Goldman

181-81	Nov 17		Opinion letter to The Honorable George E. Murray
182-81	Nov 13		Opinion letter to The Honorable James C. Kirkpatrick
183-81	Dec 21	JUDGES. JUDICIAL RETIREMENT. STATE EMPLOYEES' RETIREMENT SYSTEM.	A judge who requests and receives a refund of retirement contributions as provided in subsection 4 of Section 476.585, RSMo Supp. 1981 , will not suffer any reduction or elimination of benefits on his or her own behalf or on behalf of a spouse under the provisions of Sections 476.535, 476.540 and 476.545 which they would otherwise be eligible to receive.

Attorney General of Missouri

JEFFERSON CITY

65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

January 27, 1981

OPINION LETTER NO. 1

(Answer by Letter-Klaffenbach)

The Honorable James F. Antonio
State Auditor
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Antonio:

This letter is in response to your question asking whether the State Auditor is legally entitled to access to workpapers and reports relating to examinations conducted by the Division of Finance, Division of Savings and Loan Supervision and Division of Credit Unions.

You have furnished us a memorandum in which it is stated that the State Auditor in order to perform his duties needs access to various records of these divisions and that such access is presently denied. You have advised that this includes access to all workpapers and reports relating to examinations of financial institutions by such divisions.

You have also advised that the Division of Finance and the Division of Credit Unions deny the State Auditor access to the examination records based upon a claim of confidentiality under § 361.070, RSMo, and § 361.080, RSMo. You have also advised that the Division of Savings and Loan Supervision denies the State Auditor access to examination records under the provisions of § 369.294, RSMo.

For the sake of brevity, we have not repeated such sections here.

In the case of the Director of Revenue v. State Auditor, 511 S.W.2d 779 (Mo. 1974), the Missouri Supreme Court concluded that the Auditor's constitutional statutory duty and authority to post-audit the accounts of the Department of

The Honorable James F. Antonio

Revenue need not encompass identification of individual tax returns, and therefore there was no conflict between the Auditor's duty and the statutory sections providing for such confidentiality. The court concluded that the Auditor was in fact furnished information which was necessary to properly conduct a post-audit, such as the total shown on the face of the returns, the income of the undisclosed taxpayer, the amount of tax due, the amount remitted, refund if any, deficiency and amount credited on the department's books. The identity of the taxpayer or the detail of his return other than the totals was not necessary to the Auditor. In response to part of that decision, the Missouri Legislature enacted into law Senate Bill No. 910, 80th General Assembly (§ 32.057, RSMo Supp. 1980), which specifically permits certain records of the Department of Revenue to be subject to inspection by the State Auditor.

It is clear that the case of Director of Revenue v. State Auditor, supra, held that it is not the responsibility of the Auditor to judge the performance of the Department of Revenue or to operate the department or to determine who does or does not pay taxes but that the Auditor has the duty to post-audit accounts only, and in such a situation the duty to post-audit could be adequately performed without revealing the confidential information.

We have concluded in Attorney General's Opinion No. 117, Keyes, December 7, 1977, that the Auditor does have access to papers which are necessary to the performance of his post-audit function. It seems clear that § 29.130, RSMo, provides the State Auditor with free access to all offices of the state for the inspection of such books, accounts and papers as concern any of his duties.

Your question, however, essentially involves a determination of what constitutes a performance audit as opposed to a post-audit. We are of the view that the authority of the State Auditor to conduct a post-audit is not limited by the provisions of confidentiality contained in the cited sections relative to such divisions. We are also of the view that the question of whether or not the information to be obtained by the Auditor is necessary for a post-audit or is being demanded to fulfill a performance audit, which has been clearly held not to be within the authority of the Auditor, is a matter for determination in each individual case. We are therefore of the view that our Opinion No. 117-1977, copy of which we have enclosed, answers your question.

The Honorable James F. Antonio

It is our suggestion that the disagreement which exists between such divisions and the State Auditor be properly resolved by stipulation between such offices concerning the nature of the material to be examined, the precise use to be made of such material by the Auditor, and that appropriate identifying information be omitted from the information furnished to the Auditor to the extent that such is unnecessary to the performance of a proper post-audit.

Very truly yours,

A handwritten signature in dark ink, reading "John Ashcroft". The signature is fluid and cursive, with a long horizontal stroke at the end.

JOHN ASHCROFT
Attorney General

Enclosure
Att'y Gen. Op. No. 117,
Keyes, 12/7/1977

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

January 26, 1981

OPINION LETTER NO. 2
(Answer by Letter-Allen)

Mr. J. H. Frappier, Director
Department of Consumer, Affairs,
Regulation and Licensing
Post Office Box 1157
Jefferson City, Missouri 65102



Dear Mr. Frappier:

Your predecessor requested on behalf of the Division of Insurance an opinion of this office concerning the question whether the amendments of Senate Bill 219 of the 80th General Assembly, First Regular Session, require health services corporations organized under Chapter 354, RSMo, to make payment for chiropractic services administered to certificate or policyholders of such health services corporations. We believe that such payments are required.

The statement of facts accompanying the opinion request indicates that the Division of Insurance has received numerous complaints concerning the refusal of Blue Cross/Blue Shield to pay for chiropractic services. These complainants, including chiropractors, have assumed that S.B. 219, 80th General Assembly, requires said payment.

Section 375.936, RSMo 1978, states in part as follows:

The following are hereby defined as 'unfair methods of competition' and 'unfair deceptive acts or practices' in the business of insurance;

Mr. J. H. Frappier, Director

* * *

(11) 'Unfair discrimination'

* * *

(b) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever, including any unfair discrimination by not permitting the insured full freedom of choice in the selection of any duly licensed physician, surgeon, optometrist, chiropractor, dentist, pharmacist, pharmacy, or podiatrist; (Emphasis ours.)

Section 375.947, RSMo Supp. 1980, passed in 1979 in S.B. 219, 80th Gen. Assembly, says:

Notwithstanding the provisions of section 354.015, RSMo, all health services corporations heretofore or hereafter organized under the provisions of chapter 354, RSMo, shall be subject to all duties, obligations, and penalties imposed by sections 375.930 to 375.948. For the purposes of sections 375.930 to 375.948 only, 'business of insurance' or 'insurance business' shall include any activity in connection with the establishment and operation of the business of a health services corporation as defined in subdivision (4) of section 354.010, RSMo.

In Op. No. 100, Winkelmann, March 30, 1970, it was held that a life insurance company violates § 375.936, RSMo, if it issues a policy which excludes benefits payable to chiropractors. Therein it was stated that clearly the legislature intended to apply the provisions of § 375.936, RSMo, to chiropractic services.

Mr. J. H. Frappier, Director

Clearly, the legislature intended to apply the provisions of § 375.947, RSMo Supp. 1980, to health services corporations organized under Chapter 354, RSMo. It is equally clear that the unfair practice provisions of § 375.936, RSMo, apply to these corporations. As in 1970, the legislative intent is clear. Health services corporations organized under Chapter 354, RSMo, cannot exclude the use of chiropractic services from their coverage.

This means, for example, that if an insurance or health services policy covers a certain illness or ailment which a chiropractor is licensed to treat that the insurance must pay for such treatment. To be specific, if treatment of an injury to the back which a chiropractor is legally authorized to treat is covered by the insurance policy, a chiropractor, as well as a medical doctor or doctor of osteopathy, is authorized to give such treatment and whichever one of those health professionals is chosen must be paid under the insurance policy. Only if ailments that can be treated by chiropractors are not covered by the policy then payment need not be made.

We conclude therefore that a health services corporation organized under Chapter 354, RSMo, is required under § 375.936, RSMo, to provide benefit payments for chiropractic services.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Enc: Att'y Gen. Op. No. 100,
Winkelmann, 3/30/70

Attorney General of Missouri

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JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

October 22, 1981

OPINION LETTER NO. 5

Barrett A. Toan, Director
Department of Social Services
221 West High Street
Jefferson City, Missouri 65101



Dear Mr. Toan:

This letter is in response to the request from your department for an opinion asking whether the Missouri Division of Health should release to any member of the public information from reports that the division may have which identifies the number of abortions performed by particular hospitals.

Section 188.052, RSMo Supp. 1980, provides:

1. An individual abortion report for each abortion performed or induced upon a woman shall be completed by her attending physician.

2. An individual complication report for any post-abortion care performed upon a woman shall be completed by the physician providing such post-abortion care. This report shall include:

- (1) The date of the abortion;
- (2) The name and address of the abortion facility or hospital where the abortion was performed;
- (3) The nature of the abortion complication diagnosed or treated.

Barrett A. Toan, Director

3. All abortion reports shall be signed by the attending physician, and submitted to the state division of health within forty-five days from the date of the abortion. All complication reports shall be signed by the physician providing the post-abortion care and submitted to the division of health within forty-five days from the date of the post-abortion care.

4. A copy of the abortion report shall be made a part of the medical record of the patient of the facility or hospital in which the abortion was performed.

5. The state division of health shall be responsible for collecting all abortion reports and complication reports and collating and evaluating all data gathered therefrom and shall annually publish a statistical report based on such data from abortions performed in the previous calendar year.

Section 188.055, RSMo Supp. 1980, provides:

1. Every abortion facility, hospital, and physician shall be supplied with forms by the division of health for use in regards to the consents and reports required by sections 188.010 to 188.085. A purpose and function of such consents and reports shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.

2. All information obtained by physician, hospital, or abortion facility from a patient for the purpose of preparing reports to the division of health under sections 188.010 to 188.085 or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers. (Emphasis added)

Barrett A. Toan, Director

In rendering an opinion, it is incumbent on this office to determine the legislative intent which a statute expresses. Subsection 1 of § 188.055 clearly states that one purpose of requiring that reports be sent to the Division of Health (§ 188.052) is "the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data" The legislature clearly and unambiguously restricted access to that information in subsection 2, when it stated, "reports received by the division of health shall be confidential and shall be used only for statistical purposes." In addition, § 188.070, RSMo 1978, makes it a misdemeanor for any person to fail to maintain the confidentiality of reports submitted to the division. The legislative intent, that the information received by the division remain confidential, is unequivocally stated.

Where the statutory language is without ambiguity, the terms used by the legislature are given their plain meaning; there is no need for further construction. Chrisman v. Terminal R. Ass'n. of St. Louis, 157 S.W.2d 230 (Mo.App. 1942). We are therefore of the opinion that the information received by the Division of Health is confidential and subject to inspection only by local, state or national public health officers. We further believe that § 188.055.2, by its own terms, limits the acquisition of the health data contained in the reports received by the Division of Health to local, state or national public health officers.

This conclusion is in accordance with the holding of the United States Supreme Court in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), in which that Court held constitutional a nearly identical statutory predecessor to our present § 188.055, saying:

Recordkeeping of this kind, if not abused or overdone, can be useful to the State's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment. The added requirements for confidentiality, with the sole exception for public health officers, . . . assist and persuade us in our determination of the constitutional limits. 428 U.S. at 81.
(Emphasis added)

Barrett A. Toan, Director

Finally, in rendering this opinion, we are mindful of the existence of the physician-patient privilege as it is recognized in Missouri. We believe that a potentially serious dilution of that privilege could occur should the general public be given access to the information which physicians and others must submit pursuant to § 188.052. We further believe that in enacting § 188.055, the legislature was fully aware of the privilege and by its clear language intended to preserve the privilege inviolate.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft". The signature is written in dark ink and is positioned above the printed name and title.

JOHN ASHCROFT
Attorney General

SOLDIERS:

Depreciation is to be considered as an operating cost when calculating the average per capita cost

of each type of care provided for residents of the Missouri Veteran's Home, pursuant to Section 42.110, RSMo 1978, and that depreciation also is to be included in determining the actual cost of care for such residents pursuant to the above statute.

February 3, 1981

OPINION NO. 6

Mr. Barrett A. Toan
Director, Department of Social Services
Post Office Box 1527
Jefferson City, Missouri 65102



Dear Mr. Toan:

You have requested our legal opinion on two questions pertaining to Section 42.110, RSMo 1978: (1) Whether "depreciation" is to be considered as an "operating cost" when calculating the "average per capita cost" of each type of care provided for residents of the Missouri Veterans' Home at St. James, Missouri, and (2) if so, whether "depreciation" also is to be included in the "actual cost" of care for such residents.

Your opinion request is made on behalf of the Superintendent of the Missouri Veterans' Home, to assist him in preparation of a list of depreciable assets to be used, pursuant to the requirements of Section 42.110, to determine the amount of monthly payments, if any, to be made by residents who have a regular source of income or other financial means to help defray the cost of their care at the Veterans' Home.

Section 42.105, RSMo 1978, provides:

The persons entitled to admission into the Missouri veterans' home are citizens of the state of Missouri who have been honorably discharged, or discharged under honorable conditions, from service in any of the United States armed forces, and who, from a physical disability not the result of personal misconduct,

Mr. Barrett A. Toan

are unable to support themselves. The spouse, surviving spouse, or aged parent of such honorable discharged veteran, or veteran discharged under honorable conditions, shall also be entitled to admission to the home if they are physically unable to support themselves.

Section 42.110, RSMo 1978, provides:

Each resident of the Missouri veterans' home who has a regular source of income or other financial means shall make monthly payments by the tenth of each month to defray, or partially defray, the cost of maintaining his residence at the home. The amount to be paid shall be determined by the superintendent, who, in making the determination, shall take into consideration the income or other financial means of the resident, and the average per capita cost of the care provided. Each type of care, domiciliary or nursing, shall be considered separately and the average per capita cost will be determined by dividing the total operating cost for the last full fiscal year for each type of care by the average number of residents receiving such care for that year, provided, however, that the home shall not charge or receive from any source more than the actual cost of care for any resident. (Emphasis added).

In determining the average per capita cost for each type of care provided at the Veterans' Home, the Superintendent must first determine the total operating cost for each type of care provided during the last full fiscal year. The total operating cost for each type of care provided, divided by the average number of residents receiving such type care, equals the average per capita cost for that type care during a particular fiscal year.

An answer to the question whether depreciation should be considered as an operating cost (or operating expense -- the terms are interchangeable), lies in the interpretation of generally accepted principles of the accounting profession.

Sellin ATTORNEY'S HANDBOOK OF ACCOUNTING § 2:13[2] (3ded.1979) describes "Recovery of Cost: Depreciation" as follows:

While plant, property, and equipment assets are considered to be relatively permanent they

Mr. Barrett A. Toan

do in a very literal sense, with the exception of land, lose their utility. This can be attributed to actual wear and tear through use or the elements, inadequacy, and obsolescence. In recognition of these factors there has been established a procedure whereby the cost of these assets is recovered through periodic charges to operations as an expense over the useful life of the asset. The periodic charge to operations is called depreciation.

The periodic charge to operations takes into consideration both physical and functional depreciation. Physical depreciation embodies inadequacy and obsolescence.

It is important to understand that depreciation involves no cash accounts. It is simply giving recognition in the financial statements to expired costs of fixed assets.

* * *

E. Faris Jr., Accounting for Lawyers 93 (3d ed. 1975) states:

When dealing with assets, such as buildings and equipment having useful lives greater than a year, both good business accounting and tax law require that the cost of the asset be spread out as an expense of operation over the years that the asset is used.

The relationship of depreciation to useful lives, and the nature of depreciation as an allocation process, not a valuation process, is noted in the definition offered by the American Institute of Certified Public Accountants (AICPA) in its Accounting Terminology Bulletin No. 1, Review and Resume (1953):

Depreciation accounting is a system of accounting which aims to distribute the cost or other basic value of tangible capital assets, less salvage (if any), over the estimated useful life of the unit (which may be a group of assets) in a systematic and rational manner. It is a system of allocation, not of valuation....

Mr. Barrett A. Toan

Depreciation of a productive facility is described as follows in paragraph 5 of chapter 9C, Accounting Research Bulletin No. 43, Emergency Facilities -- Depreciation and Amortization (AICPA):

The cost of a productive facility is one of the costs of the services it renders during its useful economic life. Generally accepted accounting principles require that this cost be spread over the expected useful life of the facility in such a way as to allocate it as equitably as possible to the periods during which services are obtained from the use of the facility. This procedure is known as depreciation accounting....

The Supreme Court of Missouri has affirmed the definition of "depreciation" employed by the United States Supreme Court in Lindheimer v. Illinois Bell Tel. Co., 292 U.S. 151, 167 (1934), which is as follows:

Broadly speaking, depreciation is the loss, not restored by current maintenance, which is due to all the factors causing the ultimate retirement of the property. These factors embrace wear and tear, decay, inadequacy, and obsolescence.

See: State ex rel. City of St. Louis v. Public Service Commission, 110 S.W.2d 749, 768 (Mo., en banc, 1937).

The Court in the Lindheimer case held that a public utility's "operating expenses" properly included an annual depreciation charge. A similar holding that depreciation is a chief element of a utility's operating expense was made by the Michigan Supreme Court in Michigan Public Utilities Commission v. Michigan State Tel. Co., 200 N.W. 749, 751 (1924).

At least one Missouri case has recognized depreciation as an operating cost and expense. In a case involving breach of contract, the Court in Schmidt v. Morival Farms, 240 S.W.2d 952, 957 (Mo. 1951) stated that farm operating costs and expenses included machinery and equipment depreciation.

"Actual cost" is defined in Black's Law Dictionary (5th ed.) as follows:

The actual price paid for goods by a party, in the case of a real bona fide purchase, which

Mr. Barrett A. Toan

may not necessarily be the market value of the goods. It is a general or descriptive term which may have varying meanings according to the circumstances in which it is used. It imports the exact sum expended or loss sustained rather than the average or proportional part of the cost. Its meaning may be restricted to materials, labor, and overhead or extended to other items.

The Supreme Court of Minnesota, in State v. Northwest Poultry and Egg Co., 281 N.W. 753, 755 (1938), stated:

"Actual cost" has no common-law significance, and it is without any well understood trade or technical meaning. 'It is a general or descriptive term which may have varying meanings according to the circumstances in which it is used.' Boston Molasses Co. v. Molasses Distributors' Corp., 274 Mass. 589, 594, 175 N.E. 150, 152. It imports the exact sum expended or loss sustained rather than the average or proportional part of the cost. Lexington & West Cambridge R. Co. v. Fitchburg R. Co., 75 Mass. 226, 9 Gray 226. Its meaning may be restricted to overhead or extended to other items. 1 C.J.S. Actual, 1440. It has been used to include overhead, rent, depreciation, taxes, insurance, etc. Bulawayo Municipality v. Bulawayo Waterworks Co. Ltd. [1908] A.C. 241; Boston Molasses Co. v. Molasses Distributors' Corp., supra. (Emphasis added).

The term "actual cost" has been used to include many expenses, including depreciation. It is, therefore, our view that a court would construe the phrase as used in Section 42.110 to encompass depreciation.

Mr. Barrett A. Toan

CONCLUSION

It is the opinion of this office that depreciation is to be considered as an operating cost when calculating the average per capita cost of each type of care provided for residents of the Missouri Veteran's Home, pursuant to Section 42.110, RSMo 1978, and that depreciation also is to be included in determining the actual cost of care for such residents pursuant to the above statute.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh Sprague.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

September 28, 1981

OPINION LETTER NO. 7

Dr. James Frank, President
Lincoln University
Post Office Box 29
Jefferson City, Missouri 65102



Dear Dr. Frank:

This letter is in reply to your opinion request asking whether Lincoln University is subject to the provisions of the state purchasing law, Chapter 34, RSMo, and, if not, whether Lincoln University may make purchases through the Office of Administration.

Section 175.040, RSMo 1978, provides:

It is hereby provided that the board of curators of the Lincoln university shall organize after the manner of the board of curators of the state university of Missouri; and it is further provided, that the powers, authority, responsibilities, privileges, immunities, liabilities and compensation of the board of curators of the Lincoln university shall be the same as those prescribed by statute for the board of curators of the state university of Missouri, except as stated in this chapter.

The language of Section 175.040, RSMo, clearly shows the intention of the General Assembly of Missouri to give to the board of curators of Lincoln University powers identical to those of the board of curators of the University of Missouri, "except as stated in this chapter." In enacting that section, the legislature specifically limited the manner in which the powers of the board of curators of Lincoln University could be made dissimilar to those of the board of curators of the University of Missouri.

Dr. James Frank, President

The statutory language which gives Lincoln University's board of curators powers corresponding to those of the University of Missouri's board of curators specifically provides that exceptions shall be limited to those set forth in Chapter 175, RSMo. In the absence of an amendment to Chapter 175, RSMo, it must be concluded that the General Assembly intended that the powers of the curators of Lincoln University remain identical to those of the curators of the University of Missouri.

From this it can be concluded that to the extent that the University of Missouri, acting through its board of curators, is empowered to carry on its own affairs, including its internal business operations, the board of curators of Lincoln University has the same power and authority. However, since it appears from your question that you are specifically interested in the power of the board of curators of Lincoln University to purchase goods and services, we will not in this opinion review all of the statutory powers of the board of curators of the University of Missouri which might relate to carrying on of its business activities.

Focusing now upon the power and authority of the board of curators of Lincoln University to purchase goods and services, we will first briefly examine the same powers with respect to the board of curators of the University of Missouri. It has long been the official position of this office that the state purchasing law is not applicable to the University of Missouri because of the language of Section 9(a), Article IX of the Missouri Constitution of 1945 which states:

The government of the state university shall be vested in a board of curators consisting of nine members appointed by the governor, by and with the advice and consent of the senate.

This position was recently reaffirmed in Att'y Gen. Op. No. 55, Bradford, 2/5/79, a copy of which is enclosed.

Since the powers and authority of the board of curators of Lincoln University are analogous to those of the board of curators of the University of Missouri and because there is nothing in Chapter 175, RSMo, limiting the power of Lincoln University with respect to purchasing of goods and services, it follows that if the state purchasing law is not applicable to the University of Missouri, it does not apply to Lincoln University.

Dr. James Frank, President

Your second question asks whether Lincoln University, having the power to purchase its own goods and services, has an option to purchase goods and services through the Office of Administration.

It is our view that Lincoln University and the Office of Administration may cooperate in the purchasing of goods and services for Lincoln University.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft".

JOHN ASHCROFT
Attorney General

Enc: Att'y Gen. Op. No. 55,
Bradford, 2/5/79

HOSPITALS: A filing fee is not required in an action
COUNTY HOSPITALS: brought on behalf of a county hospital orga-
COURT COSTS: nized under the provisions of § 205.160 for
CIVIL COSTS: the collection of an overdue account.

June 10, 1981

OPINION NO. 12

The Honorable Farrell D. Hockemeier
Prosecuting Attorney
Ray County Courthouse
Richmond, Missouri 64085



Dear Mr. Hockemeier:

This opinion is in response to your question asking:

Who is responsible for payment of filing
fees and other costs of a civil action
brought on behalf of the county hospital
for collection of an over-due account?

In your opinion request, you state the facts as follows:

Ray County is a third class county. The
county hospital is organized pursuant to
the provisions of Section 205.160 - 205.378,
RSMo. Pursuant to Section 205.379, RSMo
1978, the county hospital has employed
legal counsel other than the Prosecuting
Attorney for the purpose of filing suit on
overdue accounts. Since it is a county
hospital, the Board of Trustees has request-
ed an opinion on whether it is responsible
for the payment of court costs in a civil
action filed on its behalf.

It is clear that neither the state nor the county is lia-
ble for costs unless there is a specific statutory provision
authorizing the payment of such costs. Murphy v. Limpp, 147
S.W.2d 420, 423 (Mo. 1940); Automagic Vendors, Inc. v. Morris,
386 S.W.2d 897, 900-901 (Mo. Banc 1965); Hartwig-Dischinger
Realty Co. v. Unemployment Compensation Comm., 168 S.W.2d 78,
82 (Mo. Banc 1943); Dubinsky Brothers, Inc. v. Industrial
Commission of Missouri, 373 S.W.2d 9, 16 (Mo. Banc 1963);
Labor's Educational and Political Club v. Danforth, 561 S.W.
2d 339, 350 (Mo. Banc 1977).

The Honorable Farrell D. Hockemeier

A possibly applicable statute is § 514.190, RSMo, which provides:

In suits upon obligations, bonds, or other specialties, or on contracts, express or implied, made to or with the state, or the governor thereof, or any other person, to the use of the state, or to a county, or the use of a county, and not brought on the relation or in behalf or for the use of any private person, if the plaintiff shall recover any debt or damages, costs shall also be recovered as in other cases; but if such plaintiff suffer a discontinuance, or suit be dismissed, or non prossed, or if a verdict shall be found in favor of the defendant, he shall recover his costs.

The same provision is found in Supreme Court Rule 77.18.

Section 514.200, RSMo, also provides:

In all such cases, the judgment against the state or county shall not be for costs generally, but the amount thereof shall be expressed in the judgment, and no such judgment shall afterwards be amended so as to increase the amount for which it was originally entered; and, upon a transcript of such judgment, together with a certified copy of the fee bill, showing the items of cost, being presented to the state auditor or the county court, the same shall be audited and allowed.

The same provision is found in Supreme Court Rule 77.19.

What is now § 514.190 was first enacted in 1825, R.S. 1825, p. 229, § 18, as follows:

Be it further enacted, That in all suits commenced or to be commenced upon any obligation, bond or other specialty, or any contract express or implied made to or

with the state, or the governor thereof, or any other person to the use of the state or any county, then and in every such case, if the plaintiff shall recover any debt or damages in such action, he shall recover costs as any other person in like cases, but if such plaintiff suffer a discontinuance, or be non-suited or non-prossed, or verdict pass against him, the defendant shall not recover any costs against the plaintiff.

Section 514.200, RSMo, was first enacted in 1845, R.S. Mo. 1845, p. 244, § 20, in substantially the present form. It appears that the provisions of the Laws of 1825 (514.190) very likely were intended to apply to actions brought against the state or the county on such obligations and not to actions brought by the state or the county.

By 1845, R.S. Mo. 1845, p. 244, § 19, the language which we now find in § 514.190, ". . . and not brought on the relation, or in behalf, or for the use of any private person" had been added, as well as a change in the final phrase of the section, which provided that ". . . if such plaintiff suffer a discontinuance, or be non-suited or non-prossed, or if a verdict shall be found in favor of the defendant, he shall recover his costs." This change appeared to make § 514.190 inapplicable to actions brought by private persons and seems to be consistent with the caption given that section by the revisor of statutes, which presently states, "Suits by state, adjudication of costs."

Despite the fact that § 514.190 has been in existence for such a long period of time, we find no applicable court decisions to guide us. Such section was mentioned in Murphy v. Limpp, supra, but the court stated only that:

[T]hat section, as we read it, does not govern an action of this nature. Its provisions are expressly confined to actions on contracts by the state, such as bonds, etc.

It is our view that § 514.190 does not allow costs generally against the state or the county in such actions. This view appears to be borne out by the provisions of § 514.200, which we have quoted

The Honorable Farrell D. Hockemeier

above. We believe that it is clear from the cases we have cited that for costs generally to be allowed against the state or the county there must be a statute which clearly provides that such costs shall be allowed. We do not believe that § 514.190 contains such express provisions. Under § 514.190 if the plaintiff (the state or the county) prevails, costs are to be recovered by the state or the county as in other cases. This does not mean that the legislature has imposed liability upon the state or the county in such cases for such costs. It only means that the state or the county shall recover the costs which they have incurred and which are allowable in cases in which the state or the county prevail, and if the state or the county ". . . suffer a discontinuance, or suit be dismissed, or non prossed, or if a verdict shall be found in favor of the defendant, he [the defendant] shall recover his costs." Clearly, the latter phrase with respect to the recovery of the defendant's costs does not require that the state or the county pay costs generally. If the legislature had intended that the state or county pay costs generally, it seems that they would have stated that the costs of the action would be taxed against the state or the county and would not have phrased it as they did in § 514.190.

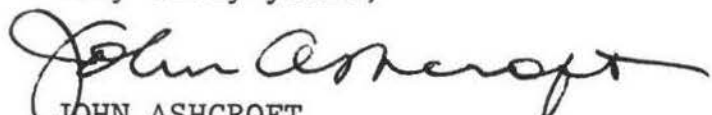
Because it is our view that § 514.190 does not make the state or the county liable in such actions for all costs of the action but only for the costs of the defendant in the situations provided, we believe that it follows that neither the state nor the county is required to comply with local court rules with respect to the filing of certain filing fees to cover the costs of the action. To the extent that liability for costs may exist under § 514.190, the board of trustees of the hospital should pay such costs out of the hospital fund.

CONCLUSION

It is the opinion of this office that a filing fee is not required in an action brought on behalf of a county hospital organized under the provisions of § 205.160 for the collection of an overdue account.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,


JOHN ASHCROFT
Attorney General

CRIMINAL LAW:
CRIMINAL PROCEDURE:
DEPARTMENT OF SOCIAL SERVICES:

A defendant receiving concurrent sentences on offenses committed both before and after the enactment of the present criminal code, can be held in

prison beyond his conditional release date on the code sentence until he is granted release on the 7/12ths date on the pre-code sentence. However, the conditional release term should continue to run simultaneously with any periods of incarceration on the longer concurrent pre-code sentence.

February 5, 1981

OPINION NO. 16

Mr. Barrett A. Toan, Director
Missouri Department of Social Services
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Mr. Toan:

This is in response to a request from your predecessor for an opinion which reads as follows:

If an individual receives concurrent sentences, one under a pre-code statute and one under the criminal code, and the conditional release date arrives before the 7/12th date, can the individual be held past his conditional release date until the arrival of his 7/12th release date?

This situation will occur whenever a defendant commits crimes both before and after January 1, 1979, the effective date of the new criminal code, and the defendant receives a longer sentence on the pre-code offense. Although § 557.011, RSMo 1978, and § 558.011.4, RSMo 1978, provide for a conditional release term for a non-code offense committed after January 1, 1979, a defendant is not entitled to a conditional release term on an offense committed prior to the effective date of the new criminal code. This is mandated by § 556.-031(3), RSMo 1978, which states, in part, that:

[A]ny offense committed prior to January 1, 1979, . . . must be construed and punished according to the provisions of law existing at the time of the commission thereof in the same manner as if this code had not been enacted, . . .

Mr. Barrett A. Toan, Director

For a pre-code offense, early release from prison is governed solely by provisions in effect prior to the enactment of the new criminal code. Parrish v. Wyrick, 589 S.W.2d 74, 79 (Mo.App., W.D. 1979). Section 216.335, RSMo 1969, provided for early release for a prisoner who served 9/12ths of his sentence. Further, administrative rules of the division of corrections provided that, for satisfactorily serving 7/12ths of his sentence, a prisoner would be entitled to recommendation for commutation by the Governor. See Parrish v. Wyrick, supra, at 78.

If a person is not entitled to be released from the penitentiary on one sentence, the longer pre-code sentence, he should not be discharged simply because he is entitled to be released on the shorter, code offense sentence. The problem with this logical conclusion is the following language of the statute dealing with conditional release under the code:

'Conditional release' means the conditional discharge of a prisoner by the division of corrections, . . . subject to the supervision under the state board of probation and parole. (Section 558.011.4(2), RSMo Supp. 1980.

Nevertheless, even though the above language indicates that an individual should be discharged from the penitentiary on arrival of his conditional release date, this is not the case when an individual is still serving time on a longer concurrent sentence. He is not entitled to be released until time for discharge on that longer sentence has arrived. Forbes v. Haynes, 465 S.W.2d 485, 491 (Mo. banc 1971). Such a person is not entitled to be released from the penitentiary until he is granted early release under the 7/12ths rule with respect to the pre-code sentence. Therefore, a prisoner is not entitled to a conditional discharge on a shorter code sentence while he is still properly incarcerated on a longer pre-code concurrent sentence.

After determining that a person must remain incarcerated on the longer pre-code sentence even after the arrival of the conditional release date on the shorter code sentence, the question that should be answered is how to serve the conditional release on the shorter sentence. A letter received by this office from the Department of Social Services presents the following situation:

Mr. Barrett A. Toan, Director

A defendant receives a three year sentence on a pre-code offense, and a two year concurrent sentence on a code offense. Under Section 558.011.4(1)(a), the defendant is entitled to conditional release after serving sixteen months in the penitentiary on the two year code sentence, but he is not entitled to early release under the 7/12ths rule until 21 months has been served on the three year pre-code sentence. Does the conditional release time run during the five months of incarceration on the longer pre-code sentence, or is it simply "dead time", with the conditional release term beginning only when the prisoner is released from the penitentiary after the 7/12ths date on the pre-code offense has arrived?

This question has been answered to a large extent in the companion opinion to this request. Att'y Gen. Op. No. 17, Toan, also issued today. Briefly, the conditional release term should continue to run while the prisoner is incarcerated on the pre-code offense sentence. Concurrent sentences run simultaneously with each other, and at the end of the longer sentence, the defendant is entitled to a discharge. State v. Tahash, 159 N.W.2d 99, 102 (Minn. 1968). The component parts of the shorter code offense sentence, both the "prison term" and the "conditional release term," run continuously with the term of imprisonment on the longer concurrent sentence of the pre-code offense. This is especially true as there are no statutes dealing with the method of serving conditional release terms while incarcerated on another sentence, and since penal statutes are involved, they must be construed liberally in favor of the defendant. State v. Treadway, 558 S.W.2d 646, 652-653 (Mo. banc 1977), cert. denied, 439 U.S. 838, 99 S.Ct. 124 (1978). If the conditional release date on the shorter code sentence was delayed until the arrival of the 7/12ths date on the longer pre-code sentence, the prisoner's shorter code sentence would be interrupted and not continuous, and it would cause the prisoner to serve five months "dead time" on the code sentence, a result contrary to the above-mentioned rule of leniency.

In the example posed by the letter request to this office, involving a two year code sentence and a three year pre-code sentence, the conditional release term on the code sentence would continue to run while the prisoner was incarcerated on the longer pre-code sentence pending the arrival of his 7/12ths date. Upon arrival

Mr. Barrett A. Toan, Director

of the 7/12ths date, the prisoner would have three remaining months of his conditional release term on his two year code sentence. He would then be released subject to the conditional release. In the example he would be in prison for 21 months.

It should be noted that, upon arrival of the conditional release date on the code sentence, the prisoner would be discharged to the custody of the board of probation and parole, even though he still remained incarcerated on the pre-code sentence. This matter is more fully explained in Opinion Number 17.

CONCLUSION

It is the opinion of this office that a defendant receiving concurrent sentences on offenses committed both before and after the enactment of the present criminal code, can be held in prison beyond his conditional release date on the code sentence until he is granted release on the 7/12ths date on the pre-code sentence. However, the conditional release term should continue to run simultaneously with any periods of incarceration on the longer concurrent pre-code sentence.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Lew A. Kollias.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

CRIMINAL LAW:
CRIMINAL PROCEDURE:
DEPARTMENT OF SOCIAL SERVICES:

If a defendant is sentenced to serve concurrent sentences of unequal length under the present criminal code, he must have the shorter sentence run continuously

with the longer sentence. The conditional release term on the shorter sentence should continue to run during the prison term on the longer sentence.

February 5, 1981

OPINION NO. 17

Mr. Barrett A. Toan, Director
Missouri Department of Social Services
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Mr. Toan:

This is in response to a request from your predecessor for an opinion asking the following question:

If an individual receives two concurrent sentences, under the criminal code, one causing the conditional release term to be longer than the other, can the individual be held until the conditional release date for the longer sentence arrives? In the alternative, how are such sentences served?

Under the new criminal code, which became effective on January 1, 1979, a novel concept of serving a term of imprisonment, apparently not used by any other state, has been introduced in Missouri. Atty. Gen. Op. No. 12, Freeman, March 13, 1980. Under the code, a sentence for a term of years is automatically broken down by statute into a "prison term" and a "conditional release term." Subsection 4 of § 558.011, RSMo Supp. 1980, states that:

(1) A sentence of imprisonment for a term of years shall consist of a prison term and a conditional release term. The conditional release term of any term imposed under section 557.036, RSMo, shall be:

Mr. Barrett A. Toan, Director

(a) One-third for terms of nine years or less;

(b) Three years for terms between nine and fifteen years;

(c) Five years for terms more than fifteen years, including life imprisonment; and the prison term shall be the remainder of such term.

(2) 'Conditional release' means the conditional discharge of a prisoner by the division of corrections, subject to conditions of release that the state board of probation and parole deems reasonable to assist the offender to lead a law-abiding life, and subject to the supervision under the state board of probation and parole. The conditions of release shall include avoidance by the offender of any other crime, federal or state, and shall prohibit technical violation of his probation and parole.

Unfortunately, the only statute dealing with concurrent sentences is of no help in answering the question posed in this opinion. Section 558.026, as amended by H.B. Nos. 1138, 1279, 1461, 1534, 1537, 1592 and 1634, 80th General Assembly, presently effective, merely states that, if a person is on probation, parole or conditional release and subsequently commits an offense for which he receives a term of years, the court shall direct the manner in which that sentence shall run with respect to any revocation of the probation, parole or conditional release term or terms. The legislature has not defined the method of serving the conditional release and prison terms of two or more concurrent sentences. The question of how to serve concurrent sentences under the new code forms the basis of this opinion. Due to the paucity of sources comprising legislative intent in Missouri, canons of construction will be relied upon to answer this question.

The first part of the question directed to this office inquires whether an individual, serving two concurrent sentences of unequal length, can be held in jail on the longer sentence even after the conditional release date of the shorter sentence has arrived. The answer to this question is clearly "yes." The difficulty leading to the formation of this question stems from the language of § 558.011.4(2), RSMo Supp. 1980, which defines, in part, "conditional release" as the conditional discharge of the prisoner by the

Mr. Barrett A. Toan, Director

division of corrections. However, just because a person is entitled to a conditional discharge on a lesser sentence, certainly does not mandate his discharge while the prison term on a longer sentence continues to run. The prisoner is entitled to be discharged from the penitentiary only when his time for release on the longer concurrent sentence has arrived. Forbes v. Haynes, 465 S.W.2d 485, 491 (Mo. banc 1971). Therefore, he must remain in the penitentiary until the conditional release term on the longer sentence arrives.

The more difficult question posed by the opinion request inquires as to how the prison term and conditional release term should be served on two concurrent sentences of unequal length. There are two possible interpretations on how to serve such sentences under the code.

The first view is that, when the prison term of the shorter sentence expires, the conditional release term is held in abeyance until the prison term on the longer sentence is served. At the end of the prison term on the longer sentence, the conditional release term of both sentences would then run concurrently, with the shorter conditional release term expiring at some point during the running of the conditional release term of the longer sentence. This interpretation finds some support in § 558.011.2(2), RSMo Supp. 1980, which states in part that, "Conditional release' means the conditional discharge of the prisoner by the division of corrections . . ." (Emphasis added.) This language of the statute could be construed to indicate that a prisoner cannot serve his conditional release term until he is discharged from the penitentiary.

The second interpretation of how concurrent terms of imprisonment should be served is the position that will be advocated by this opinion. When an offender is sentenced to concurrent terms of imprisonment, the component parts of the shorter term of imprisonment, i.e., both the prison and conditional release terms, run concurrently and continually with the prison term of the longer sentence. Only if the longer prison term expires with time remaining on the conditional release term of the shorter sentence, will the two conditional release terms then run concurrently. An example here is displayed by a defendant sentenced to six and nine year concurrent terms of imprisonment. Under § 558.011.4(1)(a), RSMo Supp. 1980, the conditional release terms for the two sentences will be two and three years, respectively. A person would serve his four year prison term on the shorter sentence, and then begin the conditional release term of two years on that sentence. The two year conditional release term would run concurrently with the remaining two year

Mr. Barrett A. Toan, Director

prison term on the longer sentence. The offender would then be discharged from the penitentiary, to begin the three year conditional release term on the longer sentence. See The New Missouri Criminal Code: A Manual For Corrections Personnel, § 3.7, comments on § 558.011.4, page 39.

The adoption of this viewpoint on how to run concurrent sentences is mandated for two principal reasons. First and foremost, statutes dealing with punishment administered for a crime are penal statutes that must be strictly construed. State v. Smith, 591 S.W.2d 263 (Mo.App., W.D. 1979). As previously mentioned, since the statutory language of sentencing and serving concurrent code sentences is not clear and is subject to two possible interpretations, the interpretation more favorable to the prisoner should prevail. Running the conditional release term on the shorter sentence during the prison term of the longer sentence is clearly more favorable to a prisoner than delaying the shorter conditional release term until the longer prison term is expired, and then running both conditional release terms concurrently. For example, assume that a longer sentence was given for a conviction of a more serious crime than the shorter sentence. When the longer prison term expired, assuming that both conditional release terms begin concurrently at that point, more stringent conditions of release may be placed on the more severe crime than on a lesser offense which carried the shorter sentence. If the prisoner committed a technical violation of a term of conditional release on only the more serious offense, then the prisoner might have to serve the remainder of the longer conditional release term as a prison term under § 558.031.5, RSMo 1980. Since the prisoner will be incarcerated, the shorter conditional release term not revoked would again be stayed until the discharge of the prisoner from the custody of the division of corrections. The prisoner, while having fully served his longer sentence, would be subject to serving the remainder of his conditional release term on the shorter sentence. A part of the conditional release term would be made consecutive to the original term of years imposed by the judge. This result is contrary to the rule of leniency favoring a defendant in construing penal statutes.

Second, concurrent sentences are to run simultaneously with each other, and the prisoner is entitled to be discharged at the end of the longer sentence. State v. Tahash, 159 N.W.2d 99, 102 (Minn. 1968). If a conditional release term on the shorter sentence were delayed until the arrival of the conditional release date on the longer concurrent sentence, the shorter sentence would be served in installments and would not run simultaneous with the longer concurrent sentence.

Mr. Barrett A. Toan, Director

Of course, the legislature can specify the manner in which concurrent sentences shall run. The legislature can mandate that a conditional release term shall run concurrently only with another conditional release term, and not with a prison term on a concurrent sentence as this opinion suggests. However, in absence of such a clear legislative intent, when there are two concurrent sentences of unequal duration, the shorter sentence should run continuously with the longer sentence.

One further matter should be mentioned. Section 558.011.4(2), RSMo Supp. 1980, is quite clear that the conditional release term of a sentence shall be served under the custody of the board of probation and parole. As mentioned above, when the conditional release date on a shorter concurrent sentence arrives, the prisoner should not be discharged from the penitentiary while he is serving the prison term on a longer concurrent sentence. However, the order of conditional release should issue on the shorter sentence, resulting in the technical discharge of the prisoner from the custody of the division of corrections on that sentence. A prisoner can be subject to conditions of probation or parole on one sentence while incarcerated in jail on another sentence. Green v. United States, 298 F.2d 230, 232 (9th Cir. 1961); § 549.271, RSMo 1978; Deckard v. Chairman, 471 S.W.2d 480 (Mo. 1971). In such a situation, it may be advisable that the terms of conditional release on the shorter sentence include the inmate's compliance with the rules and regulations of the division of corrections, in addition to any other special conditions deemed necessary to assist in the rehabilitation of the inmate.

CONCLUSION

It is the opinion of this office that if a defendant is sentenced to serve concurrent sentences of unequal length under the present criminal code, he must have the shorter sentence run continuously with the longer sentence. The conditional release term on the shorter sentence should continue to run during the prison term on the longer sentence.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Lew A. Kollias.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

January 7, 1981

OPINION LETTER NO. 20
(Answer by Letter-Downey)

The Honorable William C. McIlroy
Prosecuting Attorney
Pike County
Bowling Green, Missouri 63334



Dear Mr. McIlroy:

This letter is in answer to your question asking:

"Section 571.105 prohibits the possession or control of a machine gun to persons, with the exception of members thereof of the sheriffs, city marshalls or the navy or military forces of this State or of the United States. Deputy Sheriff, Art Fox, of the Pike County Sheriff's office is desirous of obtaining a 1928 Thompson sub-machine gun serial no. 10631. The question is whether the Statute permits a Deputy Sheriff, as well as a Sheriff, to have such a machine gun in his possession under § 571.105, for official use only."

The facts giving rise to the situation, as stated by you on the Attorney General Opinion request form are as follows:

"Deputy Sheriff, Art Fox, has located a 1928 Thompson sub-machine gun serial no. 10631, which he desires to have for official use only as a member of the Sheriff's Department of Pike County. The Department of Treasury, Bureau of Alcohol, Tobacco and Firearms in Washington, D.C. has refused to authorize transfer without opinion from the Attorney General of the State of Missouri, authorizing the deputy sheriff to have possession. They refer to § 571.105 Missouri state law, however, they refer to Sheriffs and they had a question whether or not this would pertain to Deputy Sheriffs also."

Honorable William C. McIlroy

Your question is, whether or not a deputy sheriff, in addition to a sheriff, falls within the exemption provision of § 571.105, RSMo 1978.

The exemption clause of the above mentioned statute reads as follows:

"***provided, that nothing in this section shall prohibit the sale, delivery, or transportation to police departments, or members thereof, sheriffs, city marshalls or the military or naval forces of this State or of the United States, of the possession and transportation of such machine guns, for official use by the above named officers and military and naval forces in the discharge of their duties."

In reference to your question, it becomes necessary to examine another statute, § 57.270, RSMo 1978 which reads as follows:

"Every deputy sheriff shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff."

After reviewing the exemption provision of § 571.105, RSMo 1978 in conjunction with § 57.270, RSMo 1978, it seems evident that the legislature intended deputy sheriffs be exempted from the provisions of § 571.105 in accordance with the execution of any official duties during the period that they are commissioned as deputy sheriffs. Further, reference should be made to the enclosed opinion of this office, Op. Attorney Gen. No. 99, Dalton, May 24, 1956 (Mo.), wherein we were presented with a similar question concerning which persons in a third class county, other than police officers and sheriffs, were exempt from the application of § 564.610, RSMo. 1949.

The exemption clause of that Section read as follows:

"***provided that nothing contained in this section shall apply to legally qualified sheriffs, police officers and other persons whose bonafide duty is to execute process, civil or criminal, make arrests or aid in conserving the public peace, nor to persons traveling in a continuous journey peaceably through the State."

Honorable William C. McIlroy

In reference to that exemption provision, it was stated in Opinion No. 99 at page 2, that "it is clear that sheriffs and their deputies, who have the same powers as the sheriff, would be exempt." [emphasis added]

Therefore, it is our view that deputy sheriffs, as well as sheriffs, are exempt from the provisions of § 571.105, RSMo 1978, during the period such deputy sheriffs are commissioned as such.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosure:

Att'y Gen. Op. No. 99,
Dalton, 5/24/56

SOCIAL SECURITY:
PROSECUTING ATTORNEYS:
ASSISTANT PROSECUTING ATTORNEYS:

Counties where assistant prosecutors are employed under § 56.700, RSMo Supp. 1980, are responsible for the employer's share of social security taxes and for fringe benefits provided to other county employees.

January 15, 1981

OPINION NO. 21

The Honorable Nicholas L. Swischer
Prosecuting Attorney, Vernon County
Vernon County Courthouse
Nevada, Missouri 64772

Dear Mr. Swischer:

This official opinion is issued in response to your request for a ruling on the following question:

May the judges of the county court of a third class county properly refuse to pay the employer's share of the social security tax imposed upon the salary of an assistant prosecuting attorney employed pursuant to Section 56.700, RSMo., 1979?

Subsection 1 of § 56.700, RSMo Supp. 1980, applies to your situation and provides as follows:

1. The prosecuting attorney in each county of the second, third or fourth class which contains a mental health facility able to serve at least one hundred forty persons on an overnight, inpatient basis at any one time, and which is operated by the state department of mental health, division of psychiatric services, may employ an assistant prosecuting attorney to assist in carrying out the duties of the office of prosecuting attorney relating to mental health and mental health facilities. The assistant prosecuting attorney authorized by this subsection shall be in addition to any other assistant prosecuting attorney authorized by law. The assistant prosecuting attorney employed under this subsection shall receive an annual compensation of fifteen thousand dollars payable out of the state treasury from funds appropriated for that purpose.

The Honorable Nicholas L. Swischer

In your facts you have stated that the presiding judge of the Vernon County Court received a letter from the deputy director for administration of the Department of Mental Health which said the following:

[Y]our county may employ an assistant prosecuting attorney . . . to assist in carrying out the duties relating to mental health and mental health facilities. This individual shall receive an annual compensation of fifteen thousand dollars (\$15,000) from state appropriated funds. The \$15,000 limit will include any expenses for payroll taxes and related fringe benefits.

Apparently because of this statement in the letter from the Department of Mental Health, the Vernon County Court has refused to pay the employers' contributions of social and employment security taxes thereby lowering the assistant's compensation over one thousand two hundred dollars (\$1,200) a year. You have further stated that "no other county employee who must bear the expense of paying both his own and the employer's share of such taxes."

You have further enclosed with your opinion request a letter from the county court of Vernon County in response to a request for the county to pick up the payroll taxes and fringe benefits as follows:

We have discussed your request for the County to pick up the payroll taxes and fringe benefits for the state funded mental health positions. After reviewing Section 56.700, and the letter from the Department of Mental Health, we have decided not to do this. The total cost for the positions, including salaries, payroll taxes and the fringe benefits will be paid from the State appropriated funds as stated in the Section 56.700.

Finally, the General Assembly has appropriated one hundred and eighty thousand dollars (\$180,000) "for distribution through the Office of Administration for payments to counties pursuant to House Bill 255, 80th Gen. Assembly, First Regular Session." Section 9.090, Conference Committee Substitute No. 24, H.B. No. 1009, 1980.

The Honorable Nicholas L. Swischer

Section 4 of H.B. No. 255, 80th Gen. Assembly, First Regular Session, is codified at § 56.700, RSMo Supp. 1980. In subsection 1 of the section, the prosecuting attorney is authorized to employ an assistant to carry out duties related to mental health. Thus, the assistant is an employee of the county because he has been employed by the prosecuting attorney pursuant to § 56.700.

An employee of the county is an employee for the state administered old age and survivors, disability, and handicapped insurance law, § 105.300 to § 105.440, RSMo.

The assistant employed by the prosecutor "shall receive an annual compensation of fifteen thousand dollars." This compensation to be received by the employee would constitute wages as defined for OASDHI purposes in § 105.300(11), RSMo Supp. 1980.

As the employer of the assistant prosecutor employed under § 56.700, the county is subject to extending the benefits of Title II of the Social Security Act to the assistant prosecutor as it does to its other employees.

The legislature has appropriated funds to pay fifteen thousand dollars (\$15,000) to compensate each of such assistants. Consequently, it is clear from both the wording of § 56.700, and the appropriations bill that the legislature intended to pay only compensation for such assistants rather than the payroll taxes and fringe benefits.

The county as the employer is required to pay an excise tax with respect to the compensation paid to its employees by 26 U.S.C.A. § 3111 because of the agreement entered into by the state with the federal government and the participation by agreement of the county in the state program.

The statements from the June 2, 1980, letter from the Department of Mental Health that the fifteen thousand dollars (\$15,000) received from state appropriated funds will "include any expenses for payroll taxes and related fringe benefits" should be disregarded. The assistant prosecutor should receive the fifteen thousand dollars (\$15,000) compensation subject to the usual withholding taxes. The county should contribute the employer contributions for the assistant prosecutor just as it does for the prosecutor.

The Honorable Nicholas L. Swischer

CONCLUSION

Therefore, it is the opinion of this office that counties where assistant prosecutors are employed under § 56.700, RSMo Supp. 1980, are responsible for the employers share of social security taxes and for fringe benefits provided to other county employees.

The foregoing opinion which I hereby approve, was prepared by my assistant, Reginald H. Turnbull.

Very truly yours,

A handwritten signature in black ink, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

CITIES, TOWNS & VILLAGES: After a municipal election, the city
CITY COUNCIL: council of a fourth class city must
CITY OFFICERS: meet as soon as the results of the
COMPENSATION: election can be declared, declare and
CONSTITUTIONAL LAW: certify such results, and allow the
aldermen-elect to take office upon
their taking the oath and qualifying. Such city has no authority
to delay the aldermen-elect from taking office by ordinance pro-
vision delaying such date. A compensation increase passed with
respect to such board of aldermen after the election and prior to
the date the new aldermen take office to take effect when the new
board of aldermen take office does not increase the compensation
on that date of either the alderman-elect who was not previously
an incumbent, the aldermen-elect who were incumbents, or the in-
cumbents who were not put for election.

January 28, 1981

OPINION NO. 22

The Honorable James F. Antonio
State Auditor
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Antonio:

This opinion is in response to your question asking:

If the board of aldermen pass an ordinance increasing their own compensation subsequent to an election by which part of the board was reelected but prior to the commencement of the new term of office of the reelected aldermen, is the increase in compensation legal, and, if so, on what date does the increase become effective for each member of the board of aldermen?

The city you refer to is a fourth class city with six members elected to the board of aldermen, two from each of three wards pursuant to § 79.060, RSMo. The terms of three aldermen expired in April of 1978, and two of such aldermen were re-elected at that April election. The terms of three of the other aldermen did not expire until 1979. It is also our understanding that at a regular meeting of the mayor and board of aldermen on April 17, 1978, the aldermen unanimously passed an ordinance increasing the compensation of each alderman from \$25 to \$30 per meeting. Such ordinance was to be effective from and after May 1, 1978. The board minutes and the ordinance also indicate that such ordinance was read three times, passed, and approved April 17, 1978.

The board minutes also indicate that after the ordinance was passed which purported to increase the compensation of the board of aldermen, the outgoing board of aldermen declared the

The Honorable James F. Antonio

results of the municipal election of April 4, 1978, declared the candidates elected to the various offices of the city and provided that such persons, including the newly elected aldermen, take office on May 1, 1978.

Under § 79.030, RSMo 1969, which was effective at the time this board action was taken, a general election for the elective officers of each city of the fourth class was required to be held on the first Tuesday in April, next after the organization of such city under the provisions of Chapter 79 and every two years thereafter. Section 79.030, RSMo 1969, has now been amended (See § 79.030, RSMo 1978), but that amendment has no effect on the conclusion we reach. Such amendment provides that an election for the elective officers of each city of the fourth class shall be held after the organization of such city under the provisions of Chapter 79 and on municipal election days every two years thereafter.

Our first problem is to determine the terms of such aldermen. Clearly it was intended that an election would be held for certain aldermen every two years. In State ex rel. Brown v. McMillan, 18 S.W. 784 (Mo. 1891), the Missouri Supreme Court upheld the contention of the relator, which was that § 1581 of the Revised Statutes of 1889 fixed the official term of such aldermen at two years from the first Tuesday in April, such terms beginning at the general election. Section 1581 of the Revised Statutes of 1889 provided that there would be a general election for elective officers on the first Tuesday in April after the organization of such city and every two years thereafter and was the statutory predecessor to § 79.030.

In Hawkins v. City of Fayette, 604 S.W.2d 716 (Mo. App. W.D. 1980), the Missouri Court of Appeals at l.c. 720 held that the matter of when the oath of office is taken is immaterial to its term; and that because the statutes speak of a term of office for two years, the term cannot be longer than the time when a successor is elected.

It has also been held that a fourth class city has only the powers conferred on it by statute. State ex rel. City of Republic v. Smith, 139 S.W.2d 929 (Mo. Banc 1940). We know of no authority for such a city to enact an ordinance providing that the persons elected aldermen would not take their office until May 1, 1978. It is our view that such a provision is improper because we believe that the aldermen-elect had the right to have the results of the election declared by the outgoing board of aldermen in a meeting of the board of aldermen as soon as reasonably possible after the election and to

The Honorable James F. Antonio

take office after the results of the election are declared. Such a right in our view is enforceable by mandamus. State ex inf. Anderson v. Moss, 172 S.W. 1180 (K.C. 1915). We do not say that the outgoing board of aldermen had no authority to act after the election. Clearly, such officers hold office until their successors are duly elected and qualified, and generally the acts they perform during that period are valid. Section 12 of Art. VII of the Missouri Constitution provides that "[e]xcept as provided in this constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified."

Under § 79.270, RSMo, the board of aldermen has the power to fix the compensation of all officers and employees of the city by ordinance. Such section also provides:

. . . the salary of an officer shall not be changed during the time for which he was elected or appointed.

Section 13 of Art. VII of the Missouri Constitution provides:

The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended.

We believe that it was clearly improper for the outgoing board of aldermen to attempt to change the compensation of the aldermen after the municipal election. As we have stated, it is our view that the principal order of business for the outgoing board of aldermen after the election is to declare the results of the election and to permit the newly elected aldermen to take office. The term of the aldermen-elect started after the election. The mere fact that the incumbents held over does not make such an increase in compensation any the less of a violation of § 13 of Art. VII.

We conclude that the purported increase could not go into effect, either as to the newly elected alderman, the re-elected incumbents, or those incumbents who were not then subject to election on May 1, 1978.

We do not pass upon any action of the council respecting compensation increases other than that provided to us which we have noted above. Further, we do not purport to pass upon the present compensation of the members of the board of aldermen.

The Honorable James F. Antonio

CONCLUSION

It is the opinion of this office that after a municipal election, the city council of a fourth class city must meet as soon as the results of the election can be declared, declare and certify such results, and allow the aldermen-elect to take office upon their taking the oath and qualifying. Such city has no authority to delay the aldermen-elect from taking office by ordinance provision delaying such date. A compensation increase passed with respect to such board of aldermen after the election and prior to the date the new aldermen take office to take effect when the new board of aldermen take office does not increase the compensation on that date of either the alderman-elect who was not previously an incumbent, the aldermen-elect who were incumbents, or the incumbents who were not up for election.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

PEACE OFFICERS: Juvenile officers
JUVENILE OFFICERS: do not fall within the
definition of peace officers as provided by Section 590.100(2),
RSMo.

May 18, 1981

OPINION NO. 25

Edward D. Daniel, Director
Department of Public Safety
621 E. Capitol Avenue
Jefferson City, Missouri 65102

Dear Mr. Daniel:

This opinion is in response to your predecessor's question: "Do Juvenile officers as described, under RSMo. 211.401, fall under the provisions of Chapter 590. RSMo?" At first glance, the answer would seem to be that juvenile officers might in fact fall within the provisions of Chapter 590, RSMo.

Chapter 590 RSMo relates to the selection and training of peace officers. Section 590.100(2), RSMo, defines peace officers as:

"members of the state highway patrol, all state, county, and municipal law enforcement officers possessing the duty and power of arrest for violation of the general criminal laws of the state or for violation of ordinances of counties or municipalities of the state who regularly work more than thirty-two hours a week."

Subsection 2 of section 211.401, RSMo provides:

"The juvenile officer is vested with all the power and authority of sheriffs to make arrests and perform other duties incident to his office."

Therefore, at first glance, it might seem that juvenile officers are peace officers.

However, juvenile officers are not law enforcement officers in the general sense. A reading of Chapters 211 and 590, RSMo, establishes that the legislature did not intend to include juvenile officers within the term peace officer. First, juvenile officers have a calling which is separate and distinct from peace officers. As was stated in In re F____C____, 484 S.W.2d 21, 25 (Mo.App., K.C.D. 1972):

"The Juvenile Act is rooted in the concept of parens patriae, that the state will supplant the natural parents when they fail in that role. The dominant purpose [to facilitate the care, protection and discipline of children who come within the jurisdiction of the juvenile court] is clearly stated in section 211.011, V.A.M.S. and carries through the entire Act. It is a purpose which has been reaffirmed perennially by our courts, most recently by the Supreme Court in State v. Arbeiter, Mo., 449 S.W.2d 627, 633 [2]. The juvenile officer, at least up to the adjudicatory phase of the proceeding, is the primal instrument of that purpose. He is charged by section 211.041 to investigate and bring together such information about the child as the court may require. This preliminary exploration . . . generally involves a meeting of the child and parent with the juvenile officer in an informal setting. The juvenile officer is seen there not as an adversary but in an attitude of helpfulness. He elicits the child's cooperation freely, and generally the child responds freely, often to the extent of admitting the conduct which brought him into the juvenile process to begin with Thus, the procedures and purposes of the Juvenile Act contemplate a relationship of trust and confidence between the child and juvenile officer as the first indispensable step to rehabilitation."

Thus, juvenile officers, as officers of the juvenile court, occupy a special relationship to the juvenile who comes before the court. While peace officers and juvenile officers do engage in the business of solving transgressions against society, the primary purposes of the juvenile court and its officers are the rehabilitation of the child and the treatment of his emotional and family problems, while the primary duties of peace officers are to ferret out and prevent crime. State v. Arbeiter, 449 S.W.2d 627 (Mo. 1970).

Second, in keeping with their separate functions, the legislature has provided that juvenile officers and peace officers be possessed of different qualifications and undergo separate training.

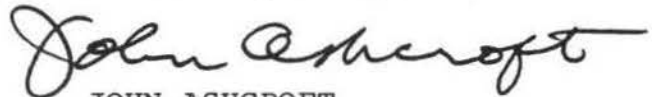
Furthermore, a close reading of Chapter 590, RSMo also discloses that the purpose of the chapter is to establish certain minimum qualifications for those peace officers who are to be appointed by law enforcement agencies. Section 590.110.1 RSMo provides that "no person shall be employed or appointed as a peace officer by any public law enforcement agency. . . ." [emphasis added] However, juvenile officers are not appointed by public law enforcement agencies; they are appointed by the juvenile court. Section 211.351.1, RSMo.

Conclusion

It is therefore our view that juvenile officers do not come within the definition of peace officers as provided by § 590.100(2), RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, S. Francis Baldwin.

Yours very truly,

A handwritten signature in dark ink, reading "John Ashcroft". The signature is fluid and cursive, with a long horizontal stroke at the end.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

65102

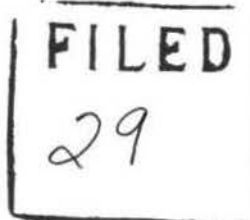
(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

June 10, 1981

OPINION LETTER NO. 29
(Answered by letter-Klaffenbach)

The Honorable Gary E. Stevenson
Prosecuting Attorney
St. Francois County
Courthouse
Farmington, Missouri 63640



Dear Mr. Stevenson:

This letter is in response to your question asking whether a non-employee of a county may be reimbursed 17 cents per mile to be paid out of the emergency fund to take an indigent citizen of the county to a hospital in St. Louis in an emergency situation after the county court orally contracts with said person for the payment. It is our understanding that the county court has entered an order directing that the payment for such transportation be made.

In the situation you present the county court was faced with conflicting legal obligations. The first obligation was to care for the county indigent, §§ 205.580, et seq., RSMo, and the second was to follow the statutory requirements respecting written contracts, § 432.070, RSMo. It is our view that in acting in an emergency to provide required care for the individual the county court acted properly and, therefore, in these premises, the payment for the mileage is proper.

Very truly yours,

JOHN ASHCROFT
Attorney General

MENTAL HEALTH:

In considering §§ 205.975 through 205.990, RSMo, in their entirety, before any entities can receive community mental health fund moneys levied and collected by counties under §§ 205.975 through 205.990, the entities are required to be designated by the Department of Mental Health in the state plan as providers of comprehensive mental health services in the catchment areas where the entities are located.

April 28, 1981

OPINION NO. 31

Paul R. Ahr, Ph.D., M.P.A.
Director, Department of Mental Health
2002 Missouri Boulevard
Jefferson City, Missouri 65101

Dear Dr. Ahr:

This official opinion is issued in response to your request for a ruling on the following question:

Are recipients of community mental health fund monies levied and collected by counties under sections 205.975 through 205.900, RSMo, required to be designated by the Department of Mental Health in the state plan as providers of the services?

In your opinion request, you have stated the following facts which gave rise to your request for this opinion:

The department has been designating the entities to receive federal, state or county funding in its state plan. Several of the existing community mental health centers are concerned about these county tax monies being used to support or purchase services from entities other than those designated by the department.

Counties are authorized by §§ 205.975 through 205.990, RSMo 1978, upon approval by a majority of their qualified voters, to levy and collect taxes and spend the funds for the establishment or maintenance, or both, of community mental health services.

Paul R. Ahr, Ph.D., M.P.A.

Generally, as courts would do if presented with your question, we must seek to gather the intent of the legislature from the ordinary meaning of the words used, considering all of §§ 205.975 through 205.990, and we must seek to promote the purpose and objects of the statute and to avoid any strained or absurd meaning. St. Louis Southwestern Ry. Co. v. Loeb, 318 S.W.2d 246 (Mo. 1959). Furthermore, we should construe the various sections so as to render them a consistent and homogeneous whole. State ex rel. Ashcroft v. Union Electric Co., 559 S.W.2d 216 (Mo.App., St.L. 1977).

The Department of Mental Health has certain duties and responsibilities concerning the comprehensive mental health services authorized to be established or maintained by the counties in §§ 205.975 through 205.990. Under § 205.976, the department is responsible for establishing catchment areas where comprehensive mental health services shall be conducted "as defined and designated in the most recent state plan of the department." In §§ 205.977, 205.982, 205.985 and 205.986, the services which the county may establish or maintain are described as "designated" by the department.

Furthermore, the Department of Mental Health is required under § 205.987 to develop and promulgate standards of construction, staffing, operations and services which any public or not-for-profit entity providing comprehensive mental health services shall meet before funds collected from the mill tax levy may be disbursed to them. The department shall annually review or inspect the records, operations and services provided by any entity receiving moneys as authorized under §§ 205.975 through 205.990.

Moreover, § 205.987 requires entities seeking not only funds derived from the county mill tax levy but also federal community mental health funds to meet the Department of Mental Health standards. For this purpose, the department shall also review and inspect the entities annually.

Finally under § 205.988 the Department of Mental Health has the responsibility to coordinate and integrate the county established or maintained comprehensive mental health services with the state mental health delivery system. The pertinent portions of § 205.988 read as follows:

Paul R. Ahr, Ph.D., M.P.A.

In addition to duties and powers elsewhere provided in sections 205.975 to 205.990, the department shall do the following:

(1) Develop and establish arrangements and procedures for the effective coordination and integration of department services and community mental health services;

(2) Provide consultative services to counties seeking to establish or support community mental health services, and provide other consultative services to the counties, community mental health centers, mental health clinics, or any comprehensive mental health services as the department may deem feasible and appropriate . . .

If a tax levy is passed as authorized by § 205.979, the county shall establish a special fund called a community mental health fund derived from levying and collecting the taxes authorized under §§ 205.980 or 205.983. County boards, whose members are appointed by the governing bodies of counties under § 205.984, shall expend moneys from these special funds only for the following purposes of establishing or maintaining comprehensive mental health services as stated in § 205.977 (and similarly in § 205.982):

(1) Providing necessary funds to establish, operate, and maintain community mental health clinics, or any comprehensive mental health services;

(2) Providing funds to supplement existing funds for the operation and maintenance of community mental health centers, mental health clinics, or any comprehensive mental health services;

(3) Purchasing any of the comprehensive mental health services from community mental health centers, mental health clinics, and other public facilities or not for profit corporations which are designated by the department. (Emphasis supplied.)

Paul R. Ahr, Ph.D., M.P.A.

In § 205.986 are listed certain powers and responsibilities for a board of trustees to control and manage the community mental health fund. Among the board's responsibilities is the following to enable the Department of Mental Health to prepare the state plans in which the entities would be designated, as follows:

(4) The board of trustees shall submit information as required on the disbursement fund set up to accomplish the purposes as set out in sections 205.977 and 205.982 to the department by such date as it specifies in order to facilitate annual preparation of regional and state plans.

Only four types of entities are authorized to receive moneys to provide services from the community mental health fund derived from the county tax levy authorized by §§ 205.975 through 205.990--community mental health centers, mental health clinics, public facilities, and not-for-profit corporations. In § 205.975(3), the term "community mental health center" is defined as follows:

[A] legal entity through which comprehensive mental health services are provided to individuals residing in a certain catchment area . . .

In § 205.975(7), the term "mental health clinic" is defined as follows:

[A] health entity offering community services delivered from a fixed place or from various places within a catchment area on an outpatient and consultative basis for the prevention, diagnosis, and treatment of emotional or mental disorders, alcoholism, or drug abuse . . .

The types of services which can be established or maintained, or both, by boards of trustees administering the community mental health fund are called "comprehensive mental health services" and defined in § 205.975(4) as follows:

[I]npatient services, outpatient services, day care and other partial hospitalization services, emergency service, diagnostic and treatment services, liaison and follow-up services, consultation and education services, rehabilitation services, prevention services, screening services, follow-up care services,

Paul R. Ahr, Ph.D., M.P.A.

transitional living services, alcoholism and alcohol abuse prevention and treatment services, and drug addiction and drug abuse prevention and treatment services . . .

It is clear by enacting §§ 205.975 through 205.990, in S.B. 652 (1978), the legislature intended the Department of Mental Health to provide quality control over the services established or maintained by the counties by defining standards for comprehensive mental health services--whether provided through community mental health centers, mental health clinics or public or not-for-profit entities providing only one or more discrete services.

Furthermore, the legislature intended the Department of Mental Health to prevent unnecessary duplication or conflict with services supported by other public funds by having the department designate in its state plan which qualified entities could receive the county funding and be effectively coordinated with and integrated into the state mental health delivery system. Other strong evidence of this legislative intent is the fact that this responsibility of the department to designate the services was not mentioned in the law as earlier enacted in S.B. 168 (1969), until 1978 when S.B. 652 became effective. See State ex rel. M. J. Gorzik Corp. v. Mosman, 315 S.W.2d 209 (Mo. 1958).

Consequently, the board of trustees which administers a community mental health fund derived from a county tax levy retains control over the fund to determine which comprehensive mental health services to establish or maintain and how much to spend from the fund to establish or maintain any of them. The control over spending the money from the fund is limited only insofar as the funds can be spent to establish or maintain entities which meet standards of and which are designated by the Department of Mental Health to provide the services in a certain catchment area.

CONCLUSION

Thus, it is the conclusion of this office that in considering §§ 205.975 through 205.990, RSMo, in their entirety, before any entities can receive community mental health fund moneys levied and collected by counties under §§ 205.975 through 205.990, the

Paul R. Ahr, Ph.D., M.P.A.

entities are required to be designated by the Department of Mental Health in the state plan as providers of comprehensive mental health services in the catchment areas where the entities are located.

The foregoing opinion which I hereby approve, was prepared by my Assistant, Reginald H. Turnbull.

Very truly yours,

A handwritten signature in dark ink, reading "John Ashcroft". The signature is written in a cursive, slightly stylized font. The first name "John" is written with a large, looping 'J' and the last name "Ashcroft" follows in a similar cursive style.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

February 4, 1981

OPINION LETTER NO. 32

(Answer by Letter-Wieler)

The Honorable Edward D. Daniel
Director, Department of Public Safety
Post Office Box 749
Jefferson City, Missouri 65102

FILED

32

Dear Mr. Daniel:

This letter is in response to your predecessor's request for an opinion as to the meaning of certain language in § 590.-140, RSMo 1978, and your responsibilities in connection therewith.

Section 590.140, RSMo 1978, provides as follows:

1. A fee of up to two dollars may be assessed as costs in each court proceeding filed in any court in the state for violations of the general criminal laws of the state, including infractions, or violations of county or municipal ordinances, provided that no such fee shall be collected for nonmoving traffic violations, and no such fee shall be collected for violations of fish and game regulations, and no such fee shall be collected in any proceeding in any court when the proceeding or defendant has been dismissed by the court. For violations of the general criminal laws of the state or county ordinances, no such fee shall be collected unless it is authorized by the county government where the violation occurred. For violations of municipal ordinances, no such fee shall be collected unless it is authorized by the municipal government where the violation occurred. Such fees shall be collected by the official of each respective court responsible for collecting

court costs and fines and shall be transmitted monthly to the treasurer of the county where the violation occurred in the case of violations of the general criminal laws of the state or county ordinances and to the treasurer of the municipality where the violation occurred in the case of violations of municipal ordinances.

2. Each county and municipality may use funds received under this section only to pay for the training required as provided in sections 590.100 to 590.150, provided that any excess funds not needed to pay for such training may be used to pay for additional training for peace officers or for training for other law enforcement officers employed or appointed by the county or municipality.

In conjunction with subsection 2, you ask whether the Department of Public Safety has any responsibility for approving the training received with excess funds, auditing these funds, or issuing rules and regulations regarding these funds and the additional training.

In our opinion, the answer is no. Section 590.105, RSMo 1978, makes it clear that the responsibility of the Director of the Department of Public Safety under §§ 590.100 to 590.150 is to establish certain minimum mandatory standards for the selection and training of peace officers. Section 590.120, RSMo 1978, requires the Director to adopt published regulations pertaining to the establishment of minimum standards. Section 590.135(1), RSMo 1978, authorizes the Director to visit and inspect any certified law enforcement training school within the state for the purpose of determining whether or not the minimum standards established pursuant to the chapter are being met. Subsection 2 of § 590.140 requires each county and municipality to use the funds received under that section only to pay for the minimum training required under §§ 590.100 to 590.150. However, each county and municipality may use any

The Honorable Edward D. Daniel

excess funds not needed to pay for the minimum mandatory training for such additional training as it sees fit. This is in keeping with subsection 2 of § 590.105, RSMo 1978, which authorizes peace officers within this state to adopt standards which are higher than the minimum standards set forth by the Director of the Department of Public Safety. In view of this, and in the absence of specific authority, the Director has no responsibility with respect to the excess funds or the type of training received therewith.

Your next questions deal with the language in subsection 1 of § 590.140, RSMo 1978, which provides that no fee shall be exacted for nonmoving traffic violations. Specifically, you ask what would be considered a moving violation, and whether or not "commercial motor vehicle violations" constitute moving or nonmoving violations.

The term "moving violation" is used in Chapter 302 to determine whether or not an assessment of points can be levied against a driver's license by the Director of Revenue. It is defined in § 302.010(10), RSMo 1978, as follows:

(10) 'Moving violation', that character of traffic violation where at the time of violation the motor vehicle involved is in motion, except that the term does not include the driving of a motor vehicle without a valid motor vehicle registration license, or violations of sections 304.170 to 304.240, RSMo, inclusive, relating to sizes and weights of vehicles;

Also, attached are three Attorney General's opinions which discuss the term and its meaning, Opinion No. 72, issued March 17, 1966, to the Honorable Thomas A. David; Opinion No. 98, issued March 24, 1966, to the Honorable Robert P. Warden; and Opinion No. 119, issued January 9, 1968, to the Honorable Thomas A. David. The definition in Chapter 302 and the discussion of the term in these opinions should be sufficient for your purposes.

By the use of the term "commercial motor vehicle violations," we assume you mean those violations involving improper motor vehicle registration of commercial vehicles or violation of the weight and length laws contained in Chapter

The Honorable Edward D. Daniel

304. Such violations are expressly excluded from the definition of "moving violation" set forth above and, therefore, would constitute nonmoving violations.

Finally, you ask whether the excess funds mentioned in subsection 2 of § 590.140 could be paid to a separate party such as the Missouri Sheriff's Association, Missouri Police Chiefs or Missouri Peace Officer's Association with the object of having those entities contract with a certified academy to have training provided to the officers in the contributing departments. We must decline to answer these questions for you. As stated above, it is our opinion that excess funds available under this subsection may be used by each county or municipality to pay for additional training for peace officers or for training other law enforcement officers employed by the county or municipality in any legal way the county or municipality sees fit. The Director of the Department of Public Safety has no control over these funds or the manner in which they are used. For this reason, we do not determine whether any particular use of such funds is proper. However, use of such funds might be invalid in a particular case if such use amounts to an illegal delegation of sovereign power.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosures:

Att'y Gen. Op. No. 72,
David, 3/17/66
Att'y Gen. Op. No. 98,
Warden, 3/24/66
Att'y Gen. Op. No. 119,
David, 1/9/68

Attorney General of Missouri

JEFFERSON CITY

65102

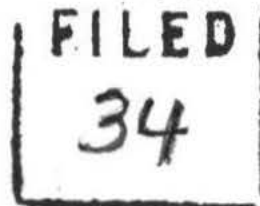
JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

February 27, 1981

OPINION LETTER NO. 34
(Answer by Letter-Schneider & Klaffenbach)

The Honorable Estil Fretwell
Representative, District No. 1
Route #2
Canton, Missouri 63435



Dear Mr. Fretwell:

This letter is in response to your question which asks:

Is the term 'classified' as used by the State Department of Elementary and Secondary Education in classifying schools synonymous with the term 'approved' as used in Section 167.131, RSMo?

Paragraph 1 of § 167.131, RSMo 1978, states as follows:

The board of education of each district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each pupil resident therein who has completed the work of the highest grade offered in the schools of the district and who attends an approved high school in another district of the same or an adjoining county, or an approved high school maintained in connection with one of the state institutions of higher learning, where work of one or more higher grades is offered.

The handbook for Classification and Accreditation of Public School Districts in Missouri, 1980, promulgated by the Missouri Department of Elementary and Secondary Education defines unclassified school district, p. 6, as follows:

The Honorable Estil Fretwell

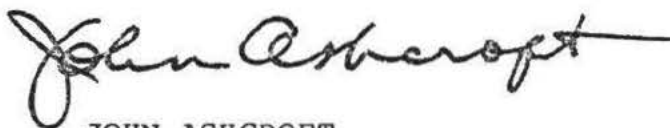
A school district that does not meet the minimum classification standards and is not accredited by the State Department of Elementary and Secondary Education. NOTE: High school credit from an unclassified public school district is not approved for unrestricted transfer to accredited public school districts.

The primary rule of statutory construction requires us to ascertain the intent of the legislature from the language used and to consider words in their plain and ordinary meaning. State v. Kraus, 530 S.W.2d 684 (Mo. banc 1975), and State ex rel. Dravo Corp. v. Spradling, 518 S.W.2d 512 (Mo. 1974). The word "approved" is ordinarily understood to mean consented to, sanctioned or confirmed. Webster's New World Dictionary, 2nd College Edition, 1976.

It is apparent that the legislature intended the word "approved" to have significance otherwise, the term is not necessary. Significance and effect should be attributed to every word in construing a statute. State v. Atterbury, 270 S.W.2d 399 (Mo. banc 1954).

Under the present statutory scheme, the State Board of Education has the power and duty to classify the public schools of the State of Missouri. The commissioner of education is the chief administrative officer of the State Board of Education. Section 161.112. Therefore, a school which is classified by the State Board of Education is one that is approved within the meaning of § 167.131.

Sincerely,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a stylized flourish at the end.

JOHN ASHCROFT
Attorney General

DEPARTMENT OF PUBLIC SAFETY:
TORT DEFENSE FUND:
ADJUTANT GENERAL:

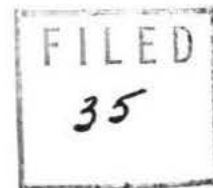
The Tort Defense Fund does
not extend generally to the
officers, agents, employees
and members of the Office of

the Adjutant General, to those in the Disaster Planning and
Operations Office, or to those in the Office of Air Search and
Rescue except to the extent that individuals so employed are
the Adjutant General or members of the Missouri National Guard.

October 2, 1981

OPINION NO. 35

Edward D. Daniel, Director
Department of Public Safety
621 East Capitol Avenue
Jefferson City, Missouri 65101



Dear Mr. Daniel:

This is in response to a request for an official opinion
sent to us by your predecessor in office, Mr. F. M. Wilson,
which states:

Are the officers, agents, employees, and
members of the Office of The Adjutant General,
those in the Disaster Planning and Operations
Office, and those in the Office of Air Search
and Rescue afforded coverage under the tort
defense fund?

The Missouri legislature by the enactment of the "Tort
Defense Fund," § 105.710, RSMo Supp. 1980, has determined
that the state will pay certain officers, employees and
agents for certain final judgments obtained against them for
acts performed in connection with their official duties.
Subsection 1 of the current version of this section reads,
in pertinent part, as follows:

As part of the compensation to be paid
to the director of the division of corrections,
the director of the department of social
services, the director of the division of
health, the director of the division of family
services, the curators and regents of public

Edward D. Daniel, Director

institutions of higher education which award baccalaureate degrees, the director of the department of mental health, the adjutant general, the head of state parks in the department of natural resources, other officers, employees and agents of the division of corrections, the division of health, the division of family services, the department of mental health, members and employees of the state highway patrol, members of the Missouri national guard, and officers and employees of the department of natural resources assigned to state parks and the administration of state parks, the commissioner of administration is authorized to pay from the "Tort Defense Fund," which is hereby created, all final judgments awarded in courts of competent jurisdiction to any claimant against the aforesaid officers, employees, agents, and members of the Missouri national guard, for acts arising out of and performed in connection with their official duties in behalf of the state. . . .
(Emphasis added)

We note that § 105.710.1 names the adjutant general and members of the Missouri National Guard. There are no references to officers, agents, employees and members of the Office of the Adjutant General, of the Disaster Planning and Operations Office, or of the Office of Air Search and Rescue.

It is a general rule of statutory construction that the mention of one thing implies the exclusion of another. Marx & Haas Jeans Clothing Co., v. Watson, 67 S.W. 391 (Mo. banc 1902). Hence, the statute which mandates a thing to be done in a given manner or by certain persons or entities normally implies that it shall not be done in any other manner or by any other persons or entities. Botany Worsted Mills v. United States, 278 U.S. 282, 49 S.Ct. 129, 73 L.Ed. 379 (1929). Although this rule of exclusion is not a rule of law, it does provide the preferred construction of a statute wherein coverage is specifically granted to certain persons, classes or entities by enumeration. State v. Bengsch, 70 S.W. 710 (Mo. banc 1902); Citizens' Nat. Bank of Kansas City v. Graham, 48 S.W. 910 (Mo. banc 1898); Henderson v. Koenig, et al., 68 S.W. 72 (Mo. banc 1902).

Edward D. Daniel, Director

The plain language of § 105.710.1 demonstrates the clear intent of the legislature to give only those persons named therein a shield from successful tort judgments obtained against them.

It is our opinion that the coverage of the Tort Defense Fund extends solely to the adjutant general and members of the Missouri National Guard. To the extent that officers, employees, agents, or members of the Office of the Adjutant General are also members of the Missouri National Guard, such persons would be included in the coverage of the fund. There is no indication in the statutes that the Office of Disaster Planning and Operations and the Office of Air Search and Rescue are an arm of the National Guard. It appears that these offices are included under the Office of the Adjutant General for purposes of management and coordination. Since these offices are not part of the National Guard, individuals employed in such offices who are not also members of the National Guard are not afforded coverage under the Tort Defense Fund.

CONCLUSION

Therefore, it is the opinion of this office that the coverage of the Tort Defense Fund does not extend generally to the officers, agents, employees and members of the office of the Adjutant General, those in the Disaster Planning and Operations Office or to those in the Office of Air Search and Rescue except to the extent that such individuals may be the Adjutant General or members of the Missouri National Guard.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

65102

(314) 751-3321

February 20, 1981

OPINION LETTER NO. 36

The Honorable George E. Murray
State Senator, 26th District
Room 433, Capitol Building
Jefferson City, Missouri 65101

Dear Senator Murray:

You have requested our official legal opinion on the following question:

If it is brought to the attention of the Board of Healing Arts that a physician is violating some provisions of section 334.100 (for example, habitual use of narcotics, grossly negligent practice, etc.), does the Board have the authority under section 334.230 RSMo to seek an immediate injunction or must they first proceed before the administrative hearing examiner.

You have also offered this explanation of your question:

Individuals and certain of one media have been publicly critical of alleged misconduct and violations of practice by members of the medical profession. Doctors individually and collectively have discussed with the Board of Healing Arts the advisability of bringing an action to enjoin unlawful practice or violations of the Practice Act under section 334.230, RSMo. The Board of Healing Arts are of the opinion that they do not have power to seek an immediate injunction, but that they are bound by Section 334.100, Sub. 4, and must first proceed pursuant to Sections 161.252 - 161.342 RSMo.

The Honorable George E. Murray

The law regulating the practice of medicine or surgery, first enacted in 1877 (see State v. Smith, 135 S.W. 463, 468 (Mo. 1911)), last generally reenacted in 1959 (S.B. No. 50) and with subsequent amendments, contains the following provisions which are relevant to your inquiry:

It shall be unlawful for any person not now a registered physician within the meaning of [this] law to practice medicine or surgery in any of its departments, or to profess to cure and attempt to treat the sick and others afflicted with bodily or mental infirmities, . . . except as herein provided. (Section 334.010, RSMo 1978.)

[A]ll persons desiring to practice as physicians and surgeons in this state shall appear before the [state] board [of registration for the healing arts] . . . and be examined as to their fitness to engage in such practice. (Section 334.040.1, RSMo 1978.)

After [August 29, 1959] . . . except as specifically provided [herein] for licensing applicants from other states or under [certification of National Board of Medical Examiners or National Board of Examiners for Osteopathic Physicians and Surgeons] . . . no license of any kind may be issued to any person by the board until he has successfully passed . . . the examination. (Section 334.-040.3, RSMo 1978.)

Every person licensed under the provisions of this chapter shall . . . each year . . . apply to the board for a certificate of registration for the ensuing year. (Section 334.080.1, RSMo 1978.)

The board may refuse to license individuals of bad moral character, or persons guilty of unprofessional or dishonorable conduct; and it may, . . . institute proceedings leading to the placing of a licensee on probation, or the suspension or revocation of a license or other right to practice, however derived, for like causes as hereinafter provided. [Examples of unprofessional or dishonorable conduct are:]

* * *

(15) Being unable to practice as a physician and surgeon or with a specialty with reasonable skill and safety to patients by reasons of medical or osteopathic incompetency, or the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of the licensee's profession, or because of illness, drunkenness, excessive use of drugs, narcotics, chemicals, or any other type of material, or as a result of any mental or physical condition. In enforcing this subdivision the board shall, upon probable cause, require a physician to submit to a reexamination for the purpose of establishing his or her competency to practice as a physician or surgeon or with a specialty . . . including . . . the examination of the pattern and practice of said physician or surgeon's professional conduct, or to submit to a mental or physical examination or combination thereof by at least three physicians, A physician whose right to practice has been affected under this subdivision shall, at reasonable intervals, be afforded an opportunity to demonstrate that he can resume the competent practice as a physician and surgeon with reasonable skill and safety to patients.

* * *

a. When the board finds any person unqualified because of any of the grounds set forth in subdivision (15), it may enter an order . . . [d]enying his application for a license; permanently withholding issuance of a license; administering a public or private reprimand; suspending or limiting or restricting his license to practice as a physician and surgeon for a period of not more than five years; revoking his license to practice as a physician and surgeon [or] requiring him to submit to the care, counseling, or treatment of physicians designated by the physician compelled to be treated. (Section 334.100.1, RSMo Supp. 1980.)

Proceedings to suspend or revoke any license, except those proceedings initiated under . . . subdivision (15), shall be initiated and maintained by the board as provided in [the administrative hearing commission law]. (Section 334.100.2, RSMo Supp. 1980.)

Any person whose license is revoked or suspended by the board shall have the right to have the proceedings [judicially] reviewed (Section 334.100.4, RSMo Supp. 1980.)

If it appears . . . to the board . . . or it is known to the board that any person is violating any of the provisions of this chapter, the board, by its own proper counsel, or the prosecuting attorney of the proper county, or the attorney general may investigate and may, in addition to any other remedies, bring action . . . against any such person to enjoin him from such violation. The action may be commenced in the county in which the defendant resides or in the county in which the defendant engages in or attempts to engage in the matters complained of. . . . [T]he injunction may be issued without proof of actual damage sustained by any person or proof that any person will sustain damage if the injunction is not granted. (Section 334.230, RSMo 1978.)

Upon receiving information that any provision of sections 334.010, . . . and 334.250 has been or is being violated, the secretary of the board . . . shall investigate, and upon probable cause appearing, the secretary shall, . . . file a complaint with the prosecuting . . . attorney of the county . . . where the alleged offense occurred. (Section 334.240, RSMo 1978.)

1. Any person who violates section 334.010 shall, . . . be adjudged guilty of a misdemeanor . . . and treating each patient is considered a separate offense. (Section 334.250, RSMo 1978.)

The Honorable George E. Murray

We perceive in these provisions essentially four different remedies that could be pursued by the State Board of Registration for the Healing Arts whenever any person may be in violation of some aspect of the medical and surgical practices law:

- (1) Criminal prosecution for a misdemeanor (§ 334.250);
- (2) Civil suit for an injunction (§ 334.230);*
- (3) Refusal, revocation or suspension of a license after a contested case before the State Administrative Hearing Commission and subject to judicial review under §§ 536.100 - 536.140 (§ 334.100.2 and .4, RSMo Supp. 1980);
- (4) Proceedings by the Board leading to denial of license, reprimand of licensee, limitation or restriction upon license, revocation or suspension of the license, or compulsory care, counselling or treatment of licensee, and subject to judicial review under § 536.150 (§ 334.100.1(15) and .4, RSMo Supp. 1980).

Remedy (1), under the terms of § 334.250, appears to be available only when the possible violation of the medical practices law is the practicing of medicine or surgery without a valid license issued by the Board. Remedy (3) appears to be available both when the person who may be in violation of the law is licensed by the Board and when he is not but is seeking licensure by the Board. Remedy (4) appears to be principally available when the person possibly in violation of the law is currently licensed by the Board. Remedy (2), about which you are concerned, is somewhat ambiguous on this point** but we think § 334.230 authorizes the seeking and issuance of an injunction not only against a person who is practicing medicine or surgery in this state without a license from the Board but also against a person holding such a license who is violating one or more of the conditions

* This remedy was not provided prior to 1959.

** An unambiguous statute in this regard is found in the law regulating funeral directors and embalmers, to wit: "The practice of embalming or funeral directing as defined in this chapter without a license or the engaging by any individual in unprofessional conduct as defined in section 333.121 is hereby declared to be a public nuisance and may be abated by injunction at the suit of the attorney general or by any prosecuting attorney . . ." Section 333.241 RSMo.

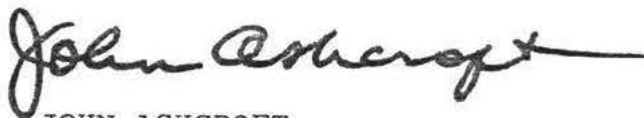
The Honorable George E. Murray

attached to the license by the medical and surgical practices law, particularly the unprofessional or dishonorable conduct described in § 334.100. The language in § 334.230, "in addition to any other remedies", appears to have been intended to counter the frequently expressed principle of equitable abstention where there is an adequate legal remedy. See e.g. State ex rel. State Tax Commission v. Yeaman, Judge, 451 S.W.2d 115, 118 (Mo. banc 1970). And, as expressed in Meyers v. Bethel Shipbuilding Corp., 303 U.S. 41 (1938):

[It is a] long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. Id. at 50-51.

Absent this particular language in § 334.230, an argument might be made that the equitable remedy of injunction against dishonorable or unprofessional conduct of a licensed physician was precluded by the adequate legal remedy of administrative proceedings, and judicial reviews thereof, leading to the revocation, suspension, or placing on probation, of the license held by an offending physician. However, because of the presence of the particular language, we believe the equitable remedy exists concurrently with the legal remedy, and is equally available to the Healing Arts Board.

Very truly yours,

A handwritten signature in dark ink, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

September 17, 1981

OPINION LETTER NO. 37



The Honorable Truman E. Wilson
Senator, District 34
c/o Senate Post Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Senator Wilson:

This letter is in response to your request for an opinion asking whether Platte County, a second class county, must comply with the notice and public hearing requirements of Section 64.645, RSMo, in the enactment of flood plain management regulations pursuant to the Federal Flood Insurance Program, National Flood Insurance Act of 1968, as amended, 42 U.S.C. Section 4001, et seq., or whether the county may proceed in accordance with Section 64.550, RSMo.

Section 64.550 relates to the official master plan and provides, among other things, that the official master plan shall be developed so as to conserve the natural resources of the county, to ensure efficient expenditure of public funds, and to promote the health, safety, convenience, prosperity and general welfare of the inhabitants. Before the adoption, amendment, or extension of the plan or portion thereof, the commission is required to hold at least one public hearing with fifteen days notice of the time and place of which to be published in at least one newspaper having general circulation within the county, and notice of such hearing also to be posted at least fifteen days in advance thereof in one or more public areas of the courthouse of the county.

Section 64.645, RSMo, provides:

After the adoption of a zoning plan or regulations adopted pursuant thereto, no use of any parcel of land included in the plan or regulations shall be changed without a public hearing and the person or body which conducts the hearing shall give notice, at least fifteen

The Honorable Truman E. Wilson

days before the hearing, by certified mail to all owners of any real property located within one thousand feet of the parcel of land for which the change is proposed.

Under Section 64.670, RSMo, the regulations imposed and districts created under the authority of Sections 64.510 to 64.690 may be amended after public hearings and public notice of such hearings given in the same manner as provided in Section 64.550.

It is our view that the changes which are proposed and are required to comply with the flood insurance program have an overall effect and accordingly, publication of notice should be given as provided in Section 64.550 and not Section 64.645.

Very truly yours,

A handwritten signature in cursive script that reads "John Ashcroft". The signature is written in dark ink and is positioned above the printed name and title.

JOHN ASHCROFT
Attorney General

LIBRARIES:

Under the terms of
§ 137.073.3, RSMo Supp.
1980, if a library dis-

trict is on a calendar year and the assessed valuation of real or real and personal property combined within the district has increased by ten percent or more over the prior year's valuation by action other than general reassessment, the tax rate set in 1980 must be lowered to the extent necessary to produce substantially the same amount of tax revenue as estimated in the library district's 1980 annual budget.

January 29, 1981

OPINION NO. 39

Mr. Charles O'Halloran
Missouri State Library
308 East High Street
Jefferson City, Missouri 65101

Dear Mr. O'Halloran:

This letter is in response to your opinion request asking the following question:

If a library district is on a calendar year and the assessed valuation of real or real and personal property combined within the district has increased by ten percent or more over the prior year's valuation by action other than general reassessment, does Section 137.073.3, RSMo Supp. 1979, require the tax rate set in September, 1980 produce substantially the same amount of tax revenue as set forth in the budget for 1980 or the budget for 1981?

Section 137.073.3, RSMo Supp. 1980, the section about which you inquire states:

Whenever the assessed valuation of real or real and personal property combined within a political subdivision or taxing authority has increased by ten percent or more over the prior year's valuation by action other than a general reassessment, the political subdivision or taxing authority shall immediately revise and lower the rates of levy for each purpose for which taxes are levied to the extent necessary to produce from all taxable property substantially the same a-

Mr. Charles O'Halloran

mount of tax revenue as set forth in estimates filed by school districts for the current year as required by section 164.-011, RSMo, or as estimated in the annual budget for the fiscal year adopted in accordance with chapters 50 and 67, RSMo, by political subdivisions other than school districts. The lower rate of levy as determined by the taxing authority, or when a court has determined the tax rate reduction, shall then be recertified to the county clerk.

In your request you specifically ask whether in the case of a library district, § 137.073.3 requires the 1980 tax rate to produce revenue commensurate with the library's 1980 budget or its 1981 budget. A reading of § 137.073.3 and the sections mentioned therein show that the section contemplates a tax rate which will produce revenue "substantially the same" as the amount of revenue estimated as necessary in the budget of the same year in which the rate is levied, that being in the instant situation the library's 1980 budget.

Section 137.073.3 states that the tax rate should be lowered so as to produce substantially the same amount of tax revenue "as estimated in the annual budget for the fiscal year adopted in accordance with chapters 50 and 67, RSMo." Section 50.540, RSMo 1978 relates to county budgets and provides the dates by which various aspects of the county budget process are to be completed. Under this section, for example, the budget officer in third and fourth class counties is not required to transmit the budget for 1981 to the county court until February 1, 1981. A county, which is on a calendar year, would not have its 1981 budget prepared by the time tax rates are set in September of 1980. Section 137.073.3, when referring to the budget adopted in accordance with Chapter 50, applicable to counties, must mean the 1980 budget, because the 1981 budget would not be prepared at the time the tax rate is set in September of 1980. Since the applicable budget prepared under Chapter 50 is obviously the 1980 calendar year budget, it follows that the applicable budget prepared under Chapter 67 for political subdivisions on a calendar year would also be the 1980 calendar year budget.

Mr. Charles O'Halloran

This opinion applies only to political subdivisions which are on a calendar year for budget purposes. In this opinion this office has not attempted to resolve questions which may arise relating to political subdivisions which are on a fiscal year other than a calendar year.

CONCLUSION

It is the opinion of this office that under the terms of § 137.073.3, RSMo Supp. 1980, if a library district is on a calendar year and the assessed valuation of real or real and personal property combined within the district has increased by ten percent or more over the prior year's valuation by action other than general reassessment, the tax rate set in 1980 must be lowered to the extent necessary to produce substantially the same amount of tax revenue as estimated in the library district's 1980 annual budget.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

STATE EMPLOYEES' RETIREMENT SYSTEM:
MEDICAL CARE PLAN:
HEALTH INSURANCE AND ACCIDENT INSURANCE:

The Board of
Trustees of the
Missouri State
Employees'

Retirement System has authority under the provisions of § 104.515, RSMo Supp. 1980, to include in any health benefits plan offered to its members the option of membership in a health maintenance organization organized under Chapter 354, RSMo 1978, and the Missouri State Employees' Retirement System must offer its members the option of membership in a qualified health maintenance organization, where twenty-five (25) or more system members reside in that HMO's service area.

November 16, 1981

OPINION NO. 40

Ms. Mary-Jean Hackwood
Executive Secretary
Missouri State Employees'
Retirement System
P. O. Box 209
Jefferson City, Missouri 65102



Dear Ms. Hackwood:

This is in response to the request of your predecessor, Al F. Holmes, Jr., for a formal opinion from this office as follows:

May the Board of Trustees of the Missouri State Employees' Retirement System provide the participants in the medical Care Plan an alternate form of coverage in Health Maintenance Organizations?

In the opinion request, it was indicated that three Health Maintenance Organizations (hereinafter referred to as "HMOs") have sought approval of the Board of Trustees to offer members of the Retirement System participation in their plans. It was further indicated that federally qualified HMOs are of the opinion that they could, under 42 U.S.C. § 300e-9, force the Retirement System to offer qualified HMOs to its members as an alternative health benefit plan.

Ms. Mary-Jean Hackwood

Federal legislation designed to stimulate the development and expansion of prepaid comprehensive health care delivery systems through federal assistance to qualified HMOs was signed into law December 29, 1973. P.L. 93-222, 87 Stat. 914 (42 U.S.C. § 300e). In brief summary of its pertinent parts, we note that the federal legislation (1) claims to supercede any state health care law which creates an impediment to the creation and/or operation of an HMO (42 U.S.C. § 300e-10); (2) provides that only those organizations which have "fiscally sound operations" and "adequate provision against the risk of insolvency which is satisfactory to the Secretary [of Health, Education and Welfare, now Health and Human Services]" and which meet other specified criteria are eligible to be federally "qualified" (42 U.S.C. §§ 300e(b), 300e(c), and 300e-9(d)); and (3) provides that certain employers, including state and local governments which receive federal payment under certain, named, Title 42 programs, (of which the State of Missouri is a recipient) must offer employees the option of participation in a qualified HMO in the HMO's service area (42 U.S.C. § 300e-9(a)(1)).

Unlike some states, Missouri does not presently have specific legislation relating to Health Maintenance Organizations. Instead, HMOs, as providers of prepaid hospital care, medical-surgical care and other health care and services, are presently authorized to do business and regulated by the Division of Insurance of the State of Missouri under Chapter 354 of the Missouri Revised Statutes. In this connection, the term "health services corporation" is defined in § 354.010(4), RSMo 1978, as follows:

"Health services corporation", any not for profit corporation heretofore or hereafter organized or operating for the purposes of establishing and operating a nonprofit plan or plans under which prepaid hospital care, medical-surgical care and other health care and services, or reimbursement therefor, may be furnished to a member or beneficiary;

Section 354.015, RSMo 1978, provides in part that while health services corporations are subject to the provisions of Chapter 354, they are not subject to any other law of this state relating to insurance or insurance companies except as otherwise specifically designated in Chapter 354. Thus upon a determination by the director of the Division of Insurance that all the requirements of Chapter 354 for commencement of business have been met, the director must

Ms. Mary-Jean Hackwood

issue to the health services corporation a certificate of authority to do business in Missouri (§ 354.060, RSMo 1978). We note that a health services corporation must have a paid-in capital or guaranty fund of not less than \$150,000 prior to the director issuing a certificate of authority to do business in Missouri (§ 354.075, RSMo 1978). Once it begins conducting business, the health services corporation must maintain reserves adequate to provide hospital, medical-surgical and other health services for its members and beneficiaries and meet all its costs and expenses (§ 354.080, RSMo 1978).

The authority of the Board of Trustees of the Missouri State Employees' Retirement System to provide a health benefits plan to members of the Retirement System is found in Chapter 104 of the Missouri Revised Statutes. Section 104.515.1, RSMo Supp. 1980, requires the Retirement System Board to:

provide or contract for insurance benefits to cover hospital, surgical and medical expenses for employees under sections 104.310 to 104.550, . . .

Presently, the Retirement System provides, but does not contract for, the benefits required under § 104.515.1; the system is self-insured.

We believe that the Retirement System is authorized to offer health benefits through a health services corporation should the system wish to contract for health benefits under § 104.515.3 which provides:

To the extent any benefits provided under this program are insured, the selection of any insurance company or service organization shall be on the basis of competitive bidding.
(Emphasis added)

As HMOs are health service corporations organized under Missouri law, the Retirement System may contract with HMOs for the provision of benefits to system members and beneficiaries.

We add the following caveat. While it is our opinion that the Retirement System may contract with an HMO for the provision of benefits under § 104.515, 42 U.S.C. § 300e-9 (a)(1) requires the system to offer employees the option of membership in a qualified health maintenance organization

Ms. Mary-Jean Hackwood

which provides health services in areas in which at least twenty-five (25) employees reside. The term "qualified health maintenance organization" is defined in subsection (d) of § 300e-9 of the Act as follows:

For purposes of this section, the term "qualified health maintenance organization" means (1) a health maintenance organization which has provided assurance satisfactory to the Secretary that it provides basic and supplemental health services to its members in the manner prescribed by section 1301(b) [42 USC § 300e(b)] of this title and that it is organized and operated in the manner prescribed by section 1301(c) [42 USC § 300e(c)] of this title, and (2) an entity which proposes to become a health maintenance organization and which the Secretary determines will when it becomes operational provide basic and supplemental health services to its members in the manner prescribed by section 1301(b) [42 USC § 300e(b)] of this title and will be organized and operated in the manner prescribed by section 1301(c) [42 USC § 300e(c)] of this title.

Thus, an HMO must meet the standards of the Department of Health and Human Services and be designated as a qualified HMO in order to receive the benefit of the mandatory choice requirements of the federal legislation.

Because Chapter 354, which pertains to health services corporations, requires only \$150,000 in initial capital, it is our view that unless sound management and fiscal policies are required of an HMO, the long-term ability of an HMO to provide health care services to Retirement System members might be seriously impaired. We believe that because of the requirements for federal qualification, and in particular the oversight of a qualified HMO's fiscal operations and the adequacy of its provisions against the risk of insolvency by the Secretary of Health and Human Services, which federal qualification mandates, the possibility of the financial demise of a qualified HMO and the inevitable loss of benefits to its participants is significantly less than where an HMO is not subject to such review.

Ms. Mary-Jean Hackwood

CONCLUSION

It is, therefore, the opinion of this office that the Board of Trustees of the Missouri State Employees' Retirement System has authority under the provisions of § 104.515, RSMo Supp. 1980, to include in any health benefits plan offered to its members the option of membership in a health maintenance organization organized under Chapter 354, RSMo 1978. It is further our opinion that the Missouri State Employees' Retirement System must offer its members the option of membership in a qualified health maintenance organization, where twenty-five (25) or more system members reside in that HMO's service area.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, B. J. Jones, and the Deputy Attorney General, Edward D. Robertson, Jr.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, cursive script.

JOHN ASHCROFT
Attorney General

RETIREMENT:
STATE EMPLOYEES' RETIREMENT SYSTEM:

Under §§ 104.310, et
seq., as amended by
House Committee Sub-
stitute for House Bills

Nos. 835, 53, 591 and 830 of the 81st General Assembly, if the employee does not use his accrued annual leave while he is an employee, and accrued annual leave is paid as a lump sum on the payroll for the employee's last month of work, the accrued annual leave is excluded from calculations of average final compensation and creditable service. Retirement benefits then commence the day after the last day worked.

June 26, 1981

OPINION NO. 43

Mrs. Jane Bierdeman-Fike
Chairperson, Missouri State
Employees' Retirement System
1801 Dawson Place
Fulton, Missouri 65251



Dear Mrs. Bierdeman-Fike:

It is our understanding that the Board of Trustees of the Missouri State Employees' Retirement System has requested an opinion of this office which we paraphrase as follows:

Under Section 104.310 does 'compensation' include salary received for accrued annual leave if the payment for such leave is authorized on the same payroll which authorizes payment for the last month, or portion thereof, of active service? In this regard please note that regular payroll checks are dated and normally received by employees prior to the end of the last working day of each month.

If the timing of payment for accrued annual leave makes a difference in eligibility of such payment to be considered as 'compensation' for purposes of retirement, may the Board enact rules requiring a consistent approach in all state agencies whereby accrued leave is paid on a supplemental payroll submitted after the date of retirement?

Mrs. Jane Bierdeman-Fike

We will first consider your first question as to the issue of "compensation". Previously, subsection 9 of § 104.310, RSMo 1969, provided as follows:

'Compensation', all salary and wages payable out of any state, federal, trust, or other funds to an employee for personal services performed for the state:

The phrase "average compensation" was defined in subsection 6 of § 104.310, RSMo 1969, in part as follows:

'Average compensation', the average annual compensation paid to a member for the five consecutive years of service prior to retirement when his compensation was greatest; or if the member had less than five consecutive years of service, the average annual compensation paid to the member during the entire period of this service; provided, that any compensation paid which enters into total compensation shall not exceed fifteen thousand dollars per annum if paid after October 13, 1967, or seven thousand five hundred dollars if paid prior to October 13, 1967;

Lastly, subsection 10 of § 104.310, RSMo 1969, defined "creditable service" as the sum of both membership service and creditable prior service. Subsection 1 of § 104.350, RSMo 1969, indicated that the phrase "year of service" as used herein shall refer to a period of twelve months during which time a member shall have performed creditable service as an employee of a department.

In 1972, Senate Bill No. 548 repealed § 104.310, along with other sections relating to the Missouri State Employees' Retirement System, and enacted a new § 104.310 relating to the same subject matter. See Laws of Missouri, 1972, p. 630. As a result, the term "compensation" as now defined in § 104.310, and as amended by House Committee Substitute for House Bills Nos. 835, 53, 591 and 830 of the 81st General Assembly, which became effective on May 12, 1981, provides as follows:

'Compensation', all salary and wages payable out of any state, federal, trust, or other funds to an employee for personal services performed for the state, except amounts paid for overtime, and amounts received as salary or wages payable in lieu of annual leave and sick leave after the member's retirement;

Mrs. Jane Bierdeman-Fike

In addition, the phrase "average compensation" is now defined in § 104.310, as amended, as follows:

'Average compensation', the average compensation of a member for the three consecutive years of service prior to retirement when the member's compensation was greatest;

It should be noted that the phrases "creditable service", and "year of service" were not substantially changed by the new legislation.

With the above legislative history in mind, it is clear that with the exception of services performed by a retiree as a consultant, a member of the Retirement System is either an employee or retiree, but not both at the same time. Therefore, it is our view that if the employee does not use his accrued annual leave while he is an employee and accrued annual leave is paid as a lump sum on the payroll for the employee's last month of work, the accrued annual leave is excluded from calculations of average final compensation and creditable service. Retirement benefits then commence the day after the last day worked.

In view of our answer to your first question, we do not believe that an answer to your second question is necessary.

CONCLUSION

It is the opinion of this office that under §§ 104.310, et seq., as amended by House Committee Substitute for House Bills Nos. 835, 53, 591 and 830 of the 81st General Assembly, if the employee does not use his accrued annual leave while he is an employee, and accrued annual leave is paid as a lump sum on the payroll for the employee's last month of work, the accrued annual leave is excluded from calculations of average final compensation and creditable service. Retirement benefits then commence the day after the last day worked.

The foregoing opinion, which I hereby approved, was prepared by my Assistant, B. J. Jones.

Very truly yours,



JOHN ASHCROFT
Attorney General

CITIES, TOWNS AND VILLAGES: Section 71.015, SSHB No. 1110, 80th General Assembly, is not applicable to cities, towns, or villages located in first class charter counties. The provisions of § 71.860, RSMo, refer to repealed § 71.015, RSMo 1978, which still applies to cities, towns, or villages in first class charter counties.

January 13, 1981

OPINION NO. 45

The Honorable Edwin L. Dirck
Senator, 24th District
Room 420, State Capitol Bldg.
Jefferson City, Missouri 65101

Dear Senator Dirck:

This opinion is in response to your question asking as follows:

Does Section 71.015, RSMo, as amended by House Bill 1110 apply to cities located in St. Louis County?

You also state:

The General Assembly enacted House Bill 1110 which, among other things, amended Section 71.015 in its entirety. Section 71.015 as amended by House Bill 1110 states specifically as follows: 'Should any city, town, or village, not located in any first class county which has adopted a constitutional charter for its own local government...'

However, Section 71.860 states as follows: 'The provisions of Section 71.015 shall apply as well to all cities, towns, villages and municipalities of whatsoever kind, located in any first class county which has adopted a constitutional charter for its own local government, except as provided in Section 71.920.'

There appears to be ambiguity as to whether or not Section 71.015 applies to cities in St. Louis County.

The Honorable Edwin L. Dirck

The changes to which you refer in § 71.015 came about as a result of Senate Substitute for House Bill No. 1110, 2nd Regular Session, 80th General Assembly. As passed and signed by the governor on May 13, 1980, with an emergency clause, § 71.015 provides in pertinent part:

Should any city, town, or village, not located in any first class county which has adopted a constitutional charter for its own local government, seek to annex an area to which objection is made, the following shall be satisfied:

.

Section 71.860, RSMo, which was enacted in 1963 and has remained unchanged since that time, provides:

The provisions of section 71.015 shall apply as well to all cities, towns, villages and municipalities of whatever kind, located in any first class county which has adopted a constitutional charter for its own local government, except as provided in section 71.920.

The problem is obviously that § 71.015, RSMo 1978, was repealed and replaced by § 71.015 of SSHB No. 1110, which expressly and clearly excludes from its application any city, town, or village, located in any first class county which has adopted a constitutional charter for its own local government. Nothing in that section in any way purports to preserve any application to cities, towns, and villages in first class charter counties. It therefore seems clear that present § 71.015 has no application to cities, towns, and villages, or municipalities of whatever kind located in first class charter counties.

However, there is clear authority for the view that, under the circumstances presented, the § 71.015 referred to in § 71.860 is § 71.015, RSMo 1978, which was enacted in 1953 and which was in existence at the time of the enactment of § 71.860 in 1963. See, City of Warrensburg v. Board of Regents of Central Missouri State University, 562 S.W.2d 340 (Mo. banc 1978); Medical Ass'n v. Joint City of Atlanta-County of Fulton Board of Tax Assessors, 207 S.E.2d 673 (Ct. App. Ga. 1974); 73 Am. Jur. 2d, Statutes, 29.

The Honorable Edwin L. Dirck

Therefore, it is our view that the legislature did not intend to void the provisions of § 71.860, and that § 71.015, RSMo 1978, as it existed prior to amendment, remains applicable to cities, towns, and villages in first class charter counties.

CONCLUSION

It is the opinion of this office that § 71.015, SSHB No. 1110, 80th General Assembly, is not applicable to cities, towns, or villages located in first class charter counties. The provisions of § 71.860, RSMo, refer to repealed § 71.015, RSMo 1978, which still applies to cities, towns, or villages in first class charter counties.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

65102

(314) 751-3321

February 19, 1981

OPINION LETTER NO. 47

Mr. Joseph Frappier, Director
Department of Consumer Affairs,
Regulation, and Licensing
101 Adams Street
Jefferson City, MO 65101

Dear Mr. Frappier:

This is in response to an opinion request of your predecessor asking the following question:

Does the Environmental Improvement Authority, by virtue of Chapter 260, RSMo 1978, or otherwise, possess powers of eminent domain?

The request comes from an interest stemming from the new hazardous waste bill, Conference Committee Substitute for House Bills Nos. 5, 6, and 4, Second Extraordinary Session of the 80th General Assembly. The request asks whether the Environmental Improvement Authority can condemn the appropriate waste disposal site most desirable for the disposal of hazardous waste.

The power of eminent domain is inherent in sovereign, but the exercise of such power is not inherent in a state agency or any board such as the Environmental Improvement Authority. Board of Regents for Northeast Missouri State Teachers College v. Palmer, 356 Mo. 946, 204 S.W.2d 291 (1947). See also, 29A C.J.S. Eminent Domain § 21. Clearly, the state legislature has the right to grant the authority to condemn property to the Environmental Improvement Authority. The question is whether such authority has been given either impliedly or expressly. 29A C.J.S. Eminent Domain § 22.

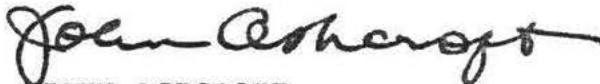
We have reviewed the powers of the Environmental Improvement Authority under § 260.035. This section indicates an ability to acquire either projects or real property or establish a hazardous waste facility. We note a complete absence of any express authority

Mr. Joseph Frappier

to condemn property. We compare this to the legislative delegation of powers to the Land Clearance for Redevelopment Authority as expressed in § 99.420(4), RSMo 1978. Therein the legislature expressly granted the power of eminent domain in connection with the acquiring of real or personal property or any interest therein including fee simple absolute title. Thus, the expression in § 260.035(9) to acquire by gift or purchase, hold and dispose of real and personal property in the exercise of its powers and performance of its duties appears to merit the application of the doctrine of expressio unius est exclusio alterius, the expression of one is the exclusion of the other. Wherein the legislature has expressly permitted acquisition by gift or purchase and has failed to state or make any reference to the power of eminent domain, it is clear to us that the Environmental Improvement Authority has no power of condemnation.

It is, therefore, our view that the Environmental Improvement Authority does not possess the power of eminent domain.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized flourish at the end.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

January 8, 1981

OPINION LETTER NO. 49

The Honorable Emory Melton
Senator, 29th District
201 West 9th Street
Cassville, Missouri 65625

Dear Senator Melton:

This official Attorney General's opinion letter is issued in response to your request for a ruling on the following questions:

Section 167.231 provides that 'Within all school districts except metropolitan districts the board of education shall provide transportation to and from school for all pupils living more than three and one half miles from school and may provide transportation for all pupils.'

Section 163.161 RSMo. provides generally for the payment of state aid for transportation and appears to be restricted to the payment of transportation costs. The latter section states: 'The state board of education shall approve all bus routes and determine the total miles each district shall have for effective and economical transportation of the pupils and shall determine allowable costs.'

My question is this: Under Section 167.-231, does not the local school board have the unrestricted right to provide transportation for all pupils (assuming they comply with all of Section 167.231), and does the statement 'The state board of education shall approve all bus routes'

The Honorable Emory Melton

refer solely to the determination of allowable costs? Is there anything to prevent the local school districts from furnishing transportation to the pupils at the cost of the local district? (Emphasis supplied by Requestor).

The questions you pose are essentially the same as the questions answered by this office in Opinion No. 75, Mallory, November 19, 1980. A copy of this opinion is included for your reference.

Based on the rationale of Opinion No. 75, which we here reaffirm, it is clearly permissible for a school district to provide transportation for all students providing that the district complies with all of the provisions of § 167.231, RSMo Supp. 1980. As you state in your request, § 163.161, RSMo Supp. 1980, relates solely to the calculation of state aid for transportation of pupils.

It is our view that local school districts may provide transportation for all students pursuant to § 167.231.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosure
Att'y Gen. Op. No. 75,
Mallory, 11/19/80

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

March 2, 1981

(314) 751-3321

OPINION LETTER NO. 50

Senator Edwin L. Dirck
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Dirck:

This letter is in response to your request for our opinion on the following question of law:

Do the provisions of Sections 311.097 and 311.100, RSMo, permit the sale of package liquor by restaurant bars on Sunday?

The facts you listed giving rise to the above mentioned question of law are as follows:

Section 311.097, RSMo, authorizes the Supervisor of Liquor Control to issue a license to restaurant bars for the sale of intoxicating liquor between the hours of 1:00 p.m. and midnight on Sunday by the drink at retail for consumption on premises. "Sale by the drink" is defined in Section 311.100, RSMo, as the sale of intoxicating liquor except malt liquor in any quantity less than 187 milliliters.

However, an Attorney General's Opinion (No. 442, issued on November 24, 1971) states that a restaurant bar licensed under 311.097, RSMo, may sell intoxicating liquor in the original package between 1:00 p.m. and midnight on Sunday, which has been interpreted to mean that quantities such as six-packs of beer may be sold by the restaurant bars. Such an interpretation appears to conflict with the definition of "sale by the drink."

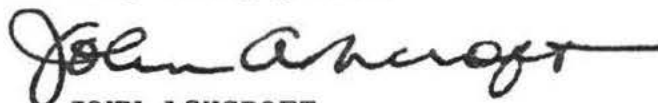
Senator Edwin L. Dirck

After careful examination, we have concluded that the question of law you now pose to this office for consideration is precisely the question of law presented to us by Colonel William Wright in 1971.

After reexamining and reevaluating that opinion, it is our view that Opinion No. 442 rendered on November 24, 1971 to Colonel William Wright is legally sound and that, therefore, the sale of liquor in the original package on Sunday by restaurant-bar licensees is authorized pursuant to the Liquor Control Act, Chapter 311, RSMo 1978.

I am enclosing a copy of Opinion No. 442 for your reference in this matter.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Enclosure
Att'y Gen. Op. No. 442
Wright, 11/24/71

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

65102

(314) 751-3321

September 21, 1981

Opinion Letter No. 51



The Honorable Samuel C. Jones
Chairman, State Tax Commission
623 East Capitol Avenue
Jefferson City, Missouri 65101

Dear Mr. Jones:

This letter is in response to your predecessor's request for an opinion as to the meaning of certain provisions in § 137.073, RSMo 1980 Supp. Your first question is as follows:

- (a) §137.073.1(1) uses the words "substantial portion of the parcels of real property within a county" in defining "general reassessment". What is a "substantial portion" under the law?

Section 137.073.1(1), RSMo 1980 Supp., defines "general reassessment" as "changes in value, entered in the assessor's books, of a substantial portion of the parcels of real property within a county resulting wholly or partly from reappraisal of value or other actions of the assessor or county equalization body or ordered by the state tax commission or any court." The legislature carefully refrained from setting forth an objective standard, such as a percentage, for determining when a general reassessment had occurred. Therefore, in construing the term "substantial," it would be improper to refer to a cardinal number or a number expressed as a percentage. Rather, the term must be used in its ordinary and normal meaning. Webster's

The Honorable Samuel C. Jones

Dictionary defines "substantial," among other things, as "considerable in amount, value or the like; large." Applying this definition to the term as used, a "general reassessment" can be said to have occurred when a large number of the parcels of real property in any given county have been changed in value as a result of a reappraisal of value by the assessor or other assessing officials. What constitutes a "large" number in any given county would depend upon the number of parcels in that county. The county clerks or the assessor in St. Louis City are in the best position to evaluate and determine whether a general reassessment has occurred and the General Assembly has wisely left such determination to them. See § 137.073.2, RSMo 1980 Supp.

Your second question is as follows:

- (b) §137.073.2 and §137.073.3 each provide for tax rate rollback upon the increase of assessments in a political subdivision. How should these sections be applied when property assessments increase in a taxing jurisdiction due to both a general reassessment and natural growth?

The answer to this question must be premised upon a determination by the county clerk or the assessor of St. Louis City that a general reassessment has occurred. If so, the rollback to be utilized is contained in § 173.073.2, RSMo 1980 Supp., even though the values listed in the assessor's books show an increase because of natural growth as well as general reassessment. The Legislature dealt with natural growth as well as reassessment in § 173.073.2 by providing that the rollback to occur when general reassessment has been accomplished is to be to the extent necessary to produce the same amount of tax revenue as the previous year, in addition to a percentage of the previous year's revenues equal to the preceeding valuation factor of the political subdivision. The "preceeding valuation factor," as defined in § 137.073.1(2), creates a picture of the natural growth occurring in any given county based on an average of the annual percentage changes in total assessed valuation over the previous three or five years, whichever is greater. When a rollback becomes necessary because of increases resulting from general reassessment, application of the statutory formula in § 137.073.2, RSMo 1980 Supp., will account for natural growth on the basis of prior experiences within each particular county.

The Honorable Samuel C. Jones

Your final question is as follows:

- (c) §137.073.3 pegs school district revenues to be raised to the amount "as set forth in estimates filed by school districts for the current year as required by section 164.011, RSMo". What is the "current year" as described by this section?

The overriding purpose of the rollback provisions of § 137.073.3, RSMo 1980 Supp., is to prevent a taxing authority from realizing a "windfall" over anticipated needs because of a radical change in tax revenues caused by higher assessment values. Although the assessment date for property in Missouri is January 1 of the calendar year, the assessor's tax book showing the changes is not completed and returned to the county governing board until May, and not available to the governing body of political subdivisions within the counties until July. See §§ 137.245, 137.375, and 137.510, RSMo 1978. For township organization counties, the applicable section for preparation of the tax book is § 137.425, RSMo 1978. The taxes to be realized are not known until the certificates of the rates levied by the county court, school districts, and other political subdivisions authorized by law to make levies are given to the county clerk who then extends the taxes upon the assessor's tax book based upon the stated values contained therein. This is not completed and turned over to the collector until October of each given year. See § 137.290, RSMo 1980 Supp.

The question involving "current year," as that term is applied to school districts, arises because school districts do not operate on a calendar year. A "school year" is defined in § 164.041, RSMo 1978, as commencing on the first day of July and ending on the thirtieth day of the following June. Section 164.011, RSMo 1978, requires each school board to annually estimate the amount of tax money needed for the ensuing year and the rate necessary to secure that amount and to forward this information to the county superintendent on or before May 15. In other school districts, the estimate must be submitted to the county clerk on or before July 15. The estimation of money needed for the ensuing year is based upon anticipated revenues available after the tax book is returned to the collector on October 31. For this reason, it is our opinion that the term "current year" as applied to school districts in § 137.073.3, RSMo 1980 Supp., refers to the estimates filed by the school boards in May or July of

The Honorable Samuel C. Jones

the calendar year in which the rollback is necessary. For example, to determine whether a rollback in the tax rates for 1981 is necessary, the applicable estimate is the estimate for the year July 1, 1981, through June 30, 1982. Those estimates, although for the ensuing school year, are based upon taxes to be realized for the calendar year once the tax books are available to the county collectors on October 31. Only the "windfall" over and above that estimate is subject to rollback under § 137.073.3, RSMo 1980 Supp., because of a ten percent or greater rise in assessed valuation.

Very truly yours,

A handwritten signature in black ink that reads "John Ashcroft". The signature is written in a cursive, slightly stylized script.

JOHN ASHCROFT
Attorney General

INSURANCE: Premiums received by an insurer under a policy or contract issued in connection with qualified or exempt annuities under the Missouri deferred compensation program are excluded from the premium tax under the provisions of § 148.390, RSMo 1978.

January 23, 1981

OPINION NO. 52

Honorable Fred E. Copeland
Representative, District 161
Room 302B, State Capitol Building
Jefferson City, MO 65101

Dear Representative Copeland:

This responds to your request for an opinion concerning the following question:

Do the provisions of § 148.390.1, RSMo 1978, excluding from the gross amount of premiums all premiums received from policies or contracts issued in connection with an annuity under the Missouri deferred compensation program apply to the premiums for the fixed and variable annuities under that program?

Additionally, you state in your opinion request the following:

Recently, it came to my attention that there may be some question as to whether premiums for the annuities under the Missouri deferred compensation program are subject to a premium tax. Section 148.390, RSMo 1978, seems to indicate that wherein the United States Internal Revenue Code was amended in connection with the funding of a pension, annuity, profit-sharing plan, or individual retirement annuity that the premium from the annuities thereunder are not subject to a direct premium tax. Numerous state employees participate in the fixed and variable annuity contracts under the Missouri deferred compensation program.

Section 148.390.1, RSMo 1978, says:

1. Every insurer, in computing the premium tax, shall exclude from the gross amount of premiums all premiums received

Honorable Fred E. Copeland

from policies or contracts, issued in connection with the funding of a pension, annuity, profit-sharing plan or individual retirement annuity, qualified or exempt under sections 401, 403, 404, 408 or 501 of the United States Internal Revenue Code as now or hereafter amended, and may deduct from the gross amount of taxable income in addition to other authorized credits, canceled and return premiums actually paid or credited, all life insurance dividends paid or credited and all fire, casualty and other insurance dividends including unused portion of premium deposits paid or credited; provided, title insurance companies may receive credit for the percentage of deductions designated in section 148.400 that title insurance premium bears to the total operations income. (Emphasis added)

We believe that the general rules of construction apply to this statute. It is our function to determine the intent of the legislature from the plain language in the statute. State ex rel. State Highway Commission v. Wiggins, 454 S.W.2d 899 (Mo. Banc 1970). Taxing statutes are construed narrowly in favor of the taxpayer. Missouri Pacific Railroad Company v. Campbell, 502 S.W.2d 354 (Mo. 1973). Additionally, the concept expressed in § 148.390 must be considered. That concept is to benefit a participant who is insured under a policy or contract issued in connection with the funding of a pension, annuity, profit-sharing, or individual retirement annuity, qualified or exempt under the United States Internal Revenue Code. The purpose and object of a statute must always be considered. State ex rel. Missouri Power & Light v. Riley, 546 S.W.2d 792 (Mo.App., K.C.D. 1977). Obviously, the legislature contemplated that the United States Internal Revenue Code would have section changes. It appears to us that the language "as now or hereafter amended" applies to the individual sections mentioned in § 148.390 which have been effectively amended in that § 457 of the United States Internal Revenue Code is an addition to those sections previously enumerated since it is of the same kind and class of exemption.

Deferred compensation falls within § 457 of the United States Internal Revenue Code. Section 457 was enacted in 1978. It is not specifically mentioned in § 148.390. It was enacted after § 148.390. The Missouri deferred compensation plan provides for annuities which are within the provisions of § 457 and the plan has federal approval. We believe that the Missouri legislature

Honorable Fred E. Copeland

intended that the amendments referred to in § 148.390 include amendments to the enumerated sections of the United States Internal Revenue Code by enactment of the provisions of law applicable to pensions, annuities, profit-sharing plans, or individual retirement annuities. Thus, the proper interpretation is not to tax premiums on such annuities.

CONCLUSION

It is the opinion of this office that premiums received by an insurer under a policy or contract issued in connection with qualified or exempt annuities under the Missouri deferred compensation program are excluded from the premium tax under the provisions of § 148.390, RSMo 1978.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Terry C. Allen.

Yours very truly,

A handwritten signature in dark ink, reading "John Ashcroft" in a cursive script.

JOHN ASHCROFT
Attorney General

June 8, 1981

OPINION LETTER NO. 53
(Answered by letter-Klaaffenbach)

The Honorable Kenneth L. Oswald
Prosecuting Attorney
Miller County
Courthouse Annex
Tuscumbia, Missouri 65026



Dear Mr. Oswald:

This letter is in response to your questions asking:

1. Does the Comprehensive Election Act of 1977, Chapter 115, RSMo. contemplate that the term 'Election Day' as used in Section 115.637(19) include that period of time during which absentee ballots may be voted at the County Clerk's Office in the Courthouse of a Third Class County?
2. If the answer to No. 1 is 'yes', is the County Clerk's Office a 'polling place' within the meaning of paragraph 19 of Sec. 115.637, RSMo?
3. If the answer to No. 2 is 'yes', is the distribution of election literature or posting of signs or placing of vehicles bearing signs with respect to any candidate or question to be voted on at an election inside the Third Class County Courthouse building in which the County Clerk's office is located an election offense and likewise is the refusal on the part of any person to remove or permit removal of the signs or election literature located within the proscribed distance or building and after request by any person an election offense?

The Honorable Kenneth L. Oswald

Section 115.637, RSMo, provides in pertinent part:

The following offenses, and any others specifically so described by law, shall be class four election offenses and are deemed misdemeanors not connected with the exercise of the right of suffrage. Conviction for any of these offenses shall be punished by imprisonment of not more than one year or by a fine of not more than two thousand five hundred dollars or by both such imprisonment and fine:

. . . .

(19) Electioneering or distributing election literature or posting signs or placing vehicles bearing signs with respect to any candidate or question to be voted on at an election on election day inside the building in which a polling place is located or within twenty-five feet of the building's outer door closest to the polling place, or, on the part of any person, refusing to remove or permit removal from property owned or controlled by him, any such election sign or literature located within such distance on such day after request for removal by any person.

It is our view that in the circumstances you present the county clerk's office is not a "polling place" within the meaning of subsection (19). The term "polling place" is defined in subsection (19) of § 115.013, RSMo Supp. 1980, as "the voting place designated for all voters residing in one or more precincts for any election." Likewise, it is clear that the term "election day" as used in subsection (19) of § 115.637 refers to the election days provided in § 115.123, RSMo Supp. 1980.

The Honorable Kenneth L. Oswald

We therefore conclude that the situation you present does not come within the prohibition of subsection (19) of § 115.-637.

An answer to your third question is therefore not required.

Very truly yours,

JOHN ASHCROFT
Attorney General

CONSTITUTIONAL LAW: It is within the power of the general assembly
STATE MONIES: to pass substantive legislation aiding crime
CRIMINAL PROCEDURE: victims and to appropriate money therefor from
general revenue. The general assembly also
has the power to pass general legislation compensating crime victims
from the proceeds of a pool of money originating from a surcharge on
court costs and to require a defendant as part of his criminal punishment to compensate his victim.

January 30, 1981

OPINION NO. 60

The Honorable Marion Cairns
Representative, District 96
17 East Swon
Webster Groves, Missouri 63119

FILED
60

Dear Mrs. Cairns:

This opinion is in response to your questions asking:

- (1) Is aid to the victims of crimes a 'rehabilitation of other persons' within the meaning of Article III, Section 38(a) of the Missouri Constitution.
- (2) May the general assembly legally appropriate money from general revenue to aid the victims of crimes?
- (3) May the general assembly legally create a 'pool of money' originating from a surcharge on court costs from which victims of crimes can be compensated for their injuries?
- (4) May the general assembly legally as part of the criminal punishment for a criminal, require the criminal to compensate his victim?
- (5) May the general assembly legally order a person (a criminal defendant) to pay an amount of money, not to a political subdivision or court, but to another private individual (a crime victim)?

The Honorable Marion Cairns

In our Opinion No. 471, dated December 29, 1966, to Keane, this office concluded that the legislature is prohibited by § 38(a), Art. III, Missouri Constitution, from granting direct relief to crime victims. That opinion also concluded that a constitutional amendment would be necessary to enable the legislature to pass laws authorizing the procedure and payment of monies, either as damages or as a claim to a crime victim.

We are now of the view that Opinion No. 471-1966 no longer properly states the law. That is, in Americans United v. Rogers, 538 S.W.2d 711 (Mo. 1976), the Missouri Supreme Court concluded that the presence of a legitimate public purpose in the laws providing for tuition grants to students attending state and private schools made society or the people of the state the direct beneficiary of the expenditures so that the scheme did not violate the requirements of the constitution that the general assembly not grant public money or property to any private person association or corporation. We are of the view that the holding of the court in Americans United v. Rogers is applicable to your question asking whether there would be any constitutional objection to the general assembly passing substantive legislation to aid victims of crimes, as opposed to special legislation or special appropriations to aid a particular crime victim, and that the Missouri Supreme Court would uphold such substantive statutes presuming they were not otherwise objectionable.

We believe this answers your first two questions.

With respect to your last three questions, it has long been held that the state constitution, unlike the federal constitution, is not a grant of power, but, as to legislative power, is only a limitation; and except for the restrictions imposed by the state constitution and the federal constitution, the power of the state legislature is unlimited and practically absolute. State ex inf. Danforth, ex rel. Farmers' Elec. Co-op, Inc. v. State Environmental Improvement Authority, 518 S.W.2d 68 (Mo. 1975).

We know of no constitutional prohibition limiting the power of the general assembly to pass general substantive legislation which would accomplish the three objectives described in your last three questions. Special legislation or special appropriations designed to aid a particular victim could not be used for such a purpose.

Whether any particular legislation or appropriation would be subject to constitutional challenge depends upon the precise form of the legislation or appropriation.

The Honorable Marion Cairns

Conclusion

It is the opinion of this office that it is within the power of the general assembly to pass substantive legislation aiding crime victims and to appropriate money therefor from general revenue. The general assembly also has the power to pass general legislation compensating crime victims from the proceeds of a pool of money originating from a surcharge on court costs and to require a defendant as part of his criminal punishment to compensate his victim.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft". The signature is written in dark ink and is positioned above the printed name and title.

JOHN ASHCROFT
Attorney General

January 9, 1981

OPINION LETTER NO. 61
(Answer to Letter-Klaffenbach)

The Honorable John A. Birch
Representative, 17th District
10106 N.W. 72nd Street
Kansas City, Missouri 64152



Dear Mr. Birch:

This letter is in response to your questions asking:

1. Does Section 322.125, RSMo 1978, apply to Platte County?
2. If so, may the county adopt provisions for the licensing, quarantine, isolation, and destruction of dogs in areas within the county outside of incorporated municipalities?
3. Section 322.120, RSMo 1978, would apparently exclude Platte County as Jackson and Platte Counties are not contiguous. Would this affect the answer to Question Number 2?

Section 322.125, RSMo, was first enacted in 1971.

In 1969, § 322.120 provided as follows:

The provisions of sections 322.090 to 322.130 shall be applicable to all counties of class one and counties of class two which adjoin a county of the first class having a charter form of government.

The Honorable John A. Birch

In 1971, § 322.120 was amended to provide, as it now provides:

Except as otherwise provided by law, the provisions of sections 322.090 to 322.130 shall be applicable to all counties of class one and counties of class two which adjoin a county of the first class having a charter form of government.

At the same time that § 322.120 was last amended, § 322.125 was enacted in its present form:

1. The county court of any county of the second class containing all or part of a city having a population of four hundred fifty thousand or more, and the county court of any such county which becomes a county of the first class without a charter form of government after September 28, 1971, may, in order to promote public health and safety, adopt by order rules and regulations for the licensing, catching, impounding, confinement, redemption, quarantine, isolation and destruction of dogs in areas within the county outside of incorporated municipalities. Such rules and regulations shall be administered by the county board of health center trustees and the county board of health center trustees is specifically empowered to carry out the provisions of sections 322.120 and 322.125.

2. The court shall adopt a schedule of fees and a method of collecting them if licensing is required. The county board of health center trustees may maintain and operate a dog pound and may provide for the employment of necessary personnel and the purchase of necessary equipment to operate the pound. The court may provide that owners of dogs impounded by the county board of health center trustees shall be responsible for the costs of keeping those animals. (Emphasis added)

The Honorable John A. Birch

It seems clear that, with this legislative history in mind, the provisions of § 322.120 do not mean that the second class county referred to in § 322.125 must adjoin a county of the first class having a charter form of government. The second class county referred to in § 322.125 is the exception which is otherwise provided for by law under § 322.120. Thus, § 322.125 applies to the county court of any county of the second class containing all or a part of a city having a population of 450,000 or more and the county court of any such county which becomes a county of the first class without a charter form of government after September 28, 1971.

Therefore, § 322.125 applies to Platte County.

Such a county may, in the language of the statute, " . . . in order to promote public health and safety, adopt by order rules and regulations for the licensing, catching, impounding, confinement, redemption, quarantine, isolation and destruction of dogs in areas within the county outside of incorporated municipalities."

Very truly yours,

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

January 14, 1981

OPINION LETTER NO. 63

The Honorable Morris Westfall
Representative, District 133
Route 2
Halfway, Missouri 65663

Dear Mr. Westfall:

This letter is in response to your question asking:

Do the acts of tuckpointing and water-proofing an existing brick building constitute construction or maintenance work for the purpose of applying prevailing wage requirements under Section 290.230 RSMo?

You also state:

A contract was let by the Bolivar R-I School District to Tadlock Construction Company for the purpose of having the exterior of an existing brick building tuckpointed and waterproofed, the building having been built in the 1930's. Tuckpointing is where rotten or loose mortar is removed from between bricks and replaced with new mortar, and a solution then applied to the wall to prevent water penetration.

At the time of letting the contract, no request was made for a prevailing wage determination and those working on the project were not paid the prevailing wage.

Subsection 1 of § 290.230, RSMo, provides:

Not less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work

The Honorable Morris Westfall

is performed, and not less than the prevailing hourly rate of wages for legal holiday and overtime work, shall be paid to all workmen employed by or on behalf of any public body engaged in the construction of public works, exclusive of maintenance work. Only such workmen as are directly employed by contractors or subcontractors in actual construction work on the site of the building or construction job shall be deemed to be employed upon public works.

As can readily be seen, the quoted provision of subsection 1 of § 290.230 contains an exception for maintenance work. Maintenance work is defined in subsection (4) of Section 290.210, RSMo, thusly:

(4) 'Maintenance work' means the repair, but not the replacement, of existing facilities when the size, type or extent of the existing facilities is not thereby changed or increased.

Subsection (1) of § 290.210 also defines "construction" as follows: "'Construction' includes construction, reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair."

It seems clear that tuckpointing work and waterproofing is normally maintenance work and therefore not within the requirements of § 290.230 relating to prevailing wages. However, the definition of "construction" in subsection (1) of § 290.210 includes "major repair." Therefore, if such work is in fact major repair work, it would come within the definition of construction.

The resolution of such a factual question however is within the jurisdiction of the Department of Labor and Industrial Relations under § 290.240, RSMo.

We also enclose four prior opinions on this subject, listed below, which may be of interest to you.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosures
Att'y Gen. Ops. Nos.
33-1958; 56-1968; 388-1966
and 32-1970

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

March 4, 1981

Addendum to Opinion Letter No. 63

The Honorable Morris Westfall
Representative, District 133
Route 2
Halfway, Missouri 65663

Dear Representative Westfall:

This office has learned that some confusion may have been created by Opinion Letter No. 63, written in response to your question concerning the applicability of the prevailing wage law to projects involving tuckpointing and waterproofing of an existing brick building. In that letter, as you may recall, we concluded that the answer to your question turned on whether the work constituted "major repair" pursuant to § 290.210(1), RSMo 1978. We further stated that the resolution of such a factual question was within the jurisdiction of the Department of Labor and Industrial Relations under § 290.240, RSMo 1978. The referred-to confusion apparently arose from this latter statement because that sentence did not set out which agency within the Department of Labor and Industrial Relations was responsible for making the factual determination.

Section 290.240 generally provides that the Department of Labor and Industrial Relations shall enforce the prevailing wage statutes. That section also provides that the Department may establish rules and regulations for carrying out the provisions of §§ 290.210 to 290.340. The Department has promulgated such a rule, 8 CSR 30-3.010, in which it has placed responsibility for enforcing prevailing wage provisions with

The Honorable Morris Westfall

the Division of Labor Standards. Thus, the Division of Labor Standards is the entity within the Department of Labor and Industrial Relations which makes the determination as to whether a particular public project constitutes "major repair" pursuant to § 290.210(1) or "maintenance work" pursuant to § 290.210(4).

We are enclosing a copy of 8 CSR 30-3.010 for your perusal. We hope this additional information helps to clarify the position expressed in Opinion Letter No. 63.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

**Title 8—DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS**
Division 30—Division of Labor Standards
Chapter 3—Prevailing Wage Law Rules

8 CSR 30-3.010 Prevailing Wage Rates for Public Funded Projects

PURPOSE: This rule sets forth prevailing wage requirements relative to work performed by workmen on public funded projects.

- (1) All public bodies of the state of Mo. contemplating construction work must obtain from the division a determination of the prevailing hourly rate of wages in the locality (wage determination) which is applicable to such construction. The rates so determined shall be incorporated in the contract specifications and made a part thereof, except that construction contracts of the State Highway Commission need not list specific wage rates to apply, but may refer to the wage rates contained in the appropriate General Wage Orders issued by the division, as applicable.
- (2) Request for wage determinations shall be initiated at least thirty calendar days before advertisement of the specifications for the contract for which the determination is sought. An exception from this provision will be made by the division only upon a proper showing of extenuating circumstances. The division has prepared and printed Form No. PW-1, for use in making a request. Said form may be secured by writing Division of Labor Standards, P. O. Box 449, Jefferson City, Mo.
- (3) A separate request must be filed for each separate project by the public body, except the State Highway Commission, which will be furnished prevailing wage determinations under General Wage Orders. One public body cannot use the wage determinations made by this department for another public body even though both public bodies are located in the same county. Special wage determinations issued by the division only apply to the public body and its project described in the special wage determination.
- (4) Any project that is awarded for completion of the project within 120 calendar days from the date of the original determination. If the determination becomes void the public body must request a new wage determination before proceeding with the project. This provision shall not apply to the General Wage Order issued by the division for the State Highway Commission.
- (5) It should be understood by all interested parties that the certified prevailing wage rates determined by the division are minimum wage rates. The contractor may not pay less than the prevailing wage rates determined by the division for the project or contract awarded to him as set forth in the proposal on which he submitted his bid. Employees are free to bargain for a higher rate of pay, and employers are free to pay a higher rate of pay.
- (6) Where classification of workmen, not included in the original contract, are desired, the public body shall request the division to issue a determination of the prevailing hourly rate of wages in the appropriate localities. In such cases, it shall be the responsibility of the public body to make such an arrangement with the contractor as would result in compliance with such wage determinations, as though they were a part of the original contract.
- (7) The public body shall make such examination of the payrolls and other records of each contractor or subcontractor as may be necessary to assure compliance with the provisions of the law. In connection with such examinations, particular attention should be given to the correctness of classifications, and any disproportionate employment of any workmen. Such examinations shall be of such frequency as may be necessary to assure conformity with the provisions of the law. An examination shall be made after the project has been substantially completed, but prior to the acceptance of the affidavit as required by section 290.290 RSMo. If any violation of sections 290.210 to 290.340 RSMo is discovered by the inspecting public body, it is their duty under section 290.250 RSMo to withhold and retain from payments to the contractor all sums and amounts due and owing as a result of any violation. Any violation shall be immediately reported to the Division of Labor Standards at P. O. Box 449, Jefferson City, Mo. 65101 or by telephone.

Attorney General of Missouri

JEFFERSON CITY

65102

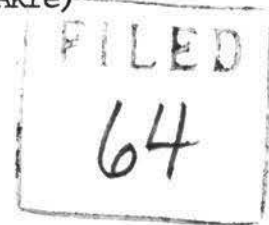
JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

April 3, 1981

OPINION LETTER NO. 64
(Answer by Letter - Akre)

Mr. W. David Blackwell
Director, Division of Corrections
P. O. Box 236
Jefferson City, Missouri 65102



Dear Mr. Blackwell:

This letter is in response to your inquiry asking whether Sections 216.191 and 216.505, RSMo Supp. 1980, allow the Division of Corrections to sell on the open market soybeans and superior quality cattle produced by the prison farm system. We understand that if soybeans are grown by the prison farms it will be to control "Johnson grass" and to increase soil fertility, not for consumption within the prison system. Similarly, the superior grade of cattle raised by the farms will not be consumed within the prison system.

Initially, sales of correctional institutions farm program products are authorized by Section 216.535, RSMo 1978. Section 216.535, provides:

The Director of the Division of Prison Farms shall plan and institute a long-range and integrated program of farm operations for each of the institutions within the department. This program shall be as diversified as practical so as to employ as many able-bodied inmates as possible and at the same time furnish the institutions with food and provisions for their own use. Products grown or processed in excess of the amounts required by the penal or correctional institutions shall be sold as provided by law for the sale of products manufactured by the Division of Prison Industries. [emphasis added].

The determinative language is: "Products grown or processed in excess of the amounts required by the penal or correctional institutions shall be sold as provided by law for the sale of products manufactured by the Division of Prison Industries". Resolution of your question is attained by reading Section 216.535 in conjunction with newly enacted Section 216.505.

H.C.S. for S.B. No. 552 80th General Assembly, Second Regular Session, repealed prior Sections 216.191 and 216.505 and enacted in lieu thereof new sections 216.191 and 216.505 with an emergency provision to make the sections effective upon passage. The new sections became effective May 9, 1980. Section 216.505, specifically addresses your inquiry and dictates an affirmative answer thereof. This section provides:

It shall be the policy of the state and of correctional industry programs to serve the state and its political subdivisions use market. Correctional industry programs are hereby authorized to produce goods for other states and their political subdivisions whenever their laws permit them to contract with this state. Before entering into any such contract with other states, an executive agreement shall first be signed between the executive authority of these states. Open market sales may be made in case of excess production and at prevailing market prices for goods of the like quality and kind, if it is considered to be in the best interest of the division.¹

Observation of the additions and deletions to repealed section 216.505 enable interpretation of the newly enacted section's impact on open market sales of soybeans and high-grade cattle by the Division of Corrections. First, the language regarding the correctional industry programs policy, "to serve only the potential state and political subdivisions use market" is changed by deletion of the restrictive word "only". Secondly,

¹

Prior section 216.505 reads as follows:

It shall be the policy of the state and the division of prison industries to serve only the potential state and political subdivisions use market, and open market sales shall be discontinued as soon as possible, but in no event shall open market sales be made except in cases of excess production and at prevailing market prices for goods of like quality and kind.

the legislature expresses its intention for the deletion of the word "only" by adding express authorization for the production of goods for other states and their political subdivisions. Third, and most persuasive in this opinion's conclusion, the express prohibition against open market sales - "[o]pen market sales shall be discontinued as soon as possible, but in no event shall open market sales be made except in case of excess production and prevailing market prices for goods of like quality and kind." - is deleted from the new section. [emphasis added]. Enacted in lieu of this prohibition, with an exception, is language allowing open market sales - "Open market sales may be made in case of excess production and at prevailing market prices for goods of like quality and kind, if it is considered to be in the best interest of the division." [emphasis added].

Obviously, the new statutory provisions have made the prior law's exception the norm. The significant change is that open market sales may be made when there is excess production and the sale would be in the best interest of the division. Previously, open market sales were prohibited except in the case of over production.

With the expansion of correctional industry programs' market for selling goods, the resultant question becomes whether growing soybeans and raising high-grade cattle fall within the ambit of and benefit from newly enacted Section 216.505. It is the understanding of this office that the growing of soybeans is part of a long-range and integrated program of diversified farm operations. The utility of soybean production is not directly derived, but rather, in accordance with good farm management, soybeans are grown in rotation with other crops to assist in the elimination of "Johnson grass" and increase subsequent crop yields of food and provisions for the institution's use grown on the same acreage. Consequently, this postponed benefit from growing soybeans leaves at harvest time the farm program with a product that has no use as the Division of Corrections does not have facilities to process soybeans into soybean meal. It follows, the farm programs' soybean yield is in excess of amounts required by the penal or correctional institutions and can be sold on the open market pursuant to Section 216.505.

Mr. W. David Blackwell
Page 4

Similarly, the prison farms' beef cattle of superior quality (good, choice, and prime grade beef) to that desired (utility and canner grade beef) by the corrections institution is an excess of a product necessary for the Division of Corrections' use. It is the understanding of this office that the raising of finished cattle is an element of a long-range and integrated program of diversified farm operations. The immediate benefit of the beef cattle operation is to employ able-bodied men and train them in cattle raising and feed lot operation. For food purposes, the institutions currently purchased on the open market lower grade cattle than raised by the prison farms' beef cattle operation at a substantially lower price. Consequently, the product - high-grade cattle - is in excess of amounts required by the penal or correctional institutions. Accordingly, the open market sale of finished cattle is permissible under Section 216.505.

Therefore, this office concludes the Division of Corrections is statutorily permitted to sell on the open market soybeans, which are grown to control "Johnson grass" and increase subsequent crop yields but not immediately converted into a usable product, and high-grade cattle, which are of superior quality to cattle required by the institutions for food.

Very truly yours,

A handwritten signature in dark ink, reading "John Ashcroft". The signature is written in a cursive, slightly stylized script.

JOHN ASHCROFT
Attorney General

CITIES, TOWNS & VILLAGES: Under the holding of State ex rel.
CITY COUNCIL: Stewart v. King, 562 S.W.2d 704 (Mo.
CITY ORDINANCES: App., K.C.D. 1978), an alderman of
a fourth class city who abstains from
voting, under § 79.130, RSMo, does
not have his abstention counted as a
vote.

February 2, 1981

OPINION NO. 65

The Honorable James R. Strong
Representative, District 119
Capitol Building, Room 105-D
Jefferson City, Missouri 65101



Dear Mr. Strong:

This opinion is in response to your question asking:

When a member of a local government
governing body abstains from a vote,
should the member be considered as
having voted with the majority?

You further state:

Attorney General Opinion #249 of Aug-
ust 6, 1965, states that when a city
council member abstains from a vote,
he is considered as having voted with
the majority. For the past fifteen
years, city officials have followed
this opinion.

Earlier this year in the State of Mis-
souri ex rel. J. R. Stewart v. King,
562 S.W.2d 704, the Kansas City Court
of Appeals specifically rejected the
proposition that an abstention should
be counted with the majority or as a
vote in favor of the matter under con-
sideration.

Because the recent decision conflicts
with your earlier opinion, we thought
that you might withdraw or revise your
opinion in order to clarify the matter.

The Honorable James R. Strong

In our Opinion No. 249, dated August 6, 1965, to Schechter, we considered the effect of an abstention, under § 79.130, relative to fourth class cities, which requires a vote of the majority of members elected to the board of aldermen. We concluded that a member who is present cannot abstain, but if he does, he is considered as voting with the majority.

In the case you cite, State ex rel. Stewart v. King, 562 S.W.2d 704 (Mo.App., K.C.D. 1978), the Missouri Court of Appeals, Kansas City District, considered a similar question with respect to the provisions of § 89.060, RSMo, relative to zoning and planning.

Section 89.060 provides in pertinent part that:

[S]uch amendment shall not become effective except by the favorable vote of three-fourths of all the members of the legislative body of such municipality. . . .

Accordingly, the court stated at l.c. 706:

[1] In support of the first of those arguments, Stewart relies on the common law rule that a councilman has a duty to vote. As a corollary to that rule, any passed vote is to be treated as an acquiescence in and a vote with the majority. Bonsack & Pearce, Inc. v. School District of Marceline, 226 Mo.App. 1238, 49 S.W.2d 1085 (1932); Mullins v. Eveland, 234 S.W.2d 639 (Mo.App. 1950).

However, this case is governed by statute, not the common law. Section 89.060 requires a favorable vote of [three-fourths of] all the councilmen. This rather clearly means that there must be actual votes affirmatively cast by three-fourths of all councilmen existing at the time of the vote. This precludes counting in favor of passage any vote only constructively (but not actually) cast. (Bracket added)

The Honorable James R. Strong

Although we respectfully question the reasoning of the court in reaching such conclusion, we believe that such opinion is applicable to the votes required under § 79.130 and that we are required to follow the opinion of the court. Because we believe the holding of the court is applicable under the provisions of § 79.130, relative to fourth class cities, if such an alderman abstains from voting, his abstention should not be counted as a vote in any event.

Therefore, we are withdrawing our Opinion No. 249 dated August 6, 1965, to Schechter. We are also withdrawing our Opinion No. 99, dated January 9, 1974, to Johnson.

Because of the confusion which is likely to result in the absence of legislation respecting this subject, we are of the view that there is a need for legislative clarification.

CONCLUSION

It is the opinion of this office that under the holding of State ex rel. Stewart v. King, 562 S.W.2d 704 (Mo.App., K.C.D. 1978), an alderman of a fourth class city who abstains from voting, under § 79.130, RSMo, does not have his abstention counted as a vote.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft". The signature is written in dark ink and is positioned above the printed name and title.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

March 12, 1981

OPINION LETTER NO. 67

Mr. Fred A. Lafser, Director
Department of Natural Resources
P. O. Box 176
1915 Southridge Drive
Jefferson City, Missouri 65102

Dear Mr. Lafser:

This is in reply to your request for an official opinion from this office concerning the following question as it appears in your letter:

With reference to "The Land Reclamation Act" Section 444.760 through 444.786, RSMo, does an "operator" as defined by Section 444.765(5) have to obtain a permit to engage in surface mining for each year that his surface mining operation remains unreclaimed even though active operations have temporarily ceased.

As further explanation of your need for this opinion, you state that surface mine operators operating under the Land Reclamation Act have let their annual permits expire without reclaiming the permit area, stating that the operators plan to return to the sites when it becomes economical to mine the commodity. They state that they cannot reclaim the area and still make a profit until the mineral has been extracted. You state that in the meantime the Department of Natural Resources must field-check these sites. You also state that while reclamation is uncompleted possible erosion and other environmental degradation may occur, and that safety hazards exist on unreclaimed mine areas.

Section 444.765(5), RSMo 1978, defining "operator" provides:

"Operator" means any person, firm or corporation engaged in and controlling a surface mining operation.

Section 444.770.1, RSMo 1978, provides:

It shall be unlawful beginning January 1, 1972, for any operator to engage in surface mining without first obtaining from the commission a permit to do so, in such form as is hereinafter provided.

Section 444.762, RSMo 1978, states the policy of this state and provides in part as follows:

... to provide, after surface mining operations are completed, for the reclamation and conservation of land subject to surface disturbance by surface mining ... to protect and promote the health, safety and general welfare of the people of this state.

This scheme is carried out by the Land Reclamation Commission created in § 444.520, RSMo 1978, by means of the permit requirement mentioned above.

It is the opinion of this office that an operator as defined by § 444.765(5), RSMo 1978, must obtain a permit each year that his surface mine remains unreclaimed after operations have begun, unless such operator transfers the operation to a successor pursuant to § 444.772.5, RSMo 1978.

This conclusion is evident from reading the entire statutory scheme. Section 444.772.4, RSMo 1978, allows an operator who is engaged in surface mining who holds a valid annual permit issued under § 444.772.1(2), to be released from reclamation responsibilities on uncompleted operations if a successor assumes responsibility for all reclamation of the area that has been mined. Section 444.772.4, RSMo 1978, also gives an operator the opportunity to renew his annual permit where he has not completed mining during the permit year.

Further, § 444.774(8) states that an operator must, thirty days after his permit has expired, show what areas have been mined during the year and have had operations completed on them. The next subsection (9) states that the operator must reclaim all of that area designated in (8) except as otherwise provided in subsection (9).

These sections indicate that a completed operation must begin the reclamation process by submitting a map within thirty days after the annual permit has expired, but also indicate that, by negative implication, an uncompleted operation need not begin reclamation. However, because § 444.772.5 states that an operator of an uncompleted operation may only be relieved of responsibility for reclamation by transferring to a successor operator, it seems clear that someone must always have a permit from the time mining operations begin until reclamation is completed.

This conclusion is buttressed by the fact that mining is a continuing process that begins with preparation of the site and removal of overburden. In the situation you have presented, the operators have removed overburden and are still in the process of getting out the mineral commodity which they will use. Therefore, they are still in the process of mining and need a permit. This continuous permitting of an area that is opened to mining also facilitates the policy declared in § 444.762, RSMo 1978, to protect and promote the health, safety and general welfare of the people of this state, and to protect the natural resources of the state from environmental harm.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

January 16, 1981

OPINION LETTER NO. 68

The Honorable Kaye Steinmetz
Representative, District 57
13 Longhenrich Drive
Florissant, Missouri 63031

Dear Mrs. Steinmetz:

This letter is in response to your questions asking:

- (1) Does section 578.100, RSMo, 'the Sunday sales law', prevent a community festival, participated in by civic and service groups, local businesses and private citizens, from selling handicraft, art work, food stuffs etc. on Sunday in St. Louis County?
- (2) Under the Missouri statutes and the Sunday sales law, are community festivals treated differently from retail or wholesale business establishments?
- (3) Are festival game booths or 'county fair type games' illegal lotteries within the meaning of Article III, section 39(9) of the state constitution?
- (4) Since the passage of the 'Bingo amendment' by the voters at the 1980 general election exempted certain bingo type games from the state lottery law, must charitable, religious and fraternal organizations wait for the passage of statutory enabling legislation by the general assembly before such groups can conduct Bingo games at their events?

The Honorable Kaye Steinmetz

You also state:

During the first weekend in May each year, the Florissant Valley of Flowers Festival takes place. The festival is held in Florissant (St. Louis County) on the days of Friday, Saturday and Sunday.

The Valley of Flowers Festival started out as part of the community betterment program but now operates independently. The festival committee is composed of representatives from civic organizations and service clubs, such as the Rotary, Jaycees and Kiwanis.

Such clubs, local businesses and private citizens sponsor game booths; sell such items as homemade jams, jellies, pickles and cakes; sell original artwork and handicrafts and have food stands i.e. selling hotdogs and soft drinks. These groups or persons pay a fee to the festival for being allowed to have a booth at the festival.

The City of Florissant provides no funds for the festival but does allow the use of its city parks.

The festival wishes to add Bingo type games to the list of events held at this year's festival.

In answer to your first and second questions, we enclose a copy of our Opinion No. 171, dated June 4, 1973, to Reed, in which this office concluded that a not-for-profit civic club which operates a gift shop manned by unpaid voluntary workers selling goods, wares and merchandise prohibited from sale on Sunday is not exempt from the provisions of the law even though the profits are contributed to charity. It is our view that the conclusion of this opinion is applicable here even though the statute has since been amended and renumbered as § 578.100, RSMo. Therefore, the Sunday sales law does prohibit the Sunday sale of certain merchandise by such a group. The community festivals are not treated differently under the statute than are ordinary businesses.

The Honorable Kaye Steinmetz

The answer to your third and fourth questions can be found in amended § 39(a), Art. III of the Missouri Constitution. Such provision states in pertinent part:

The game commonly known as bingo when conducted by religious, charitable, fraternal, veteran or service organizations is not a lottery or gift enterprise within the meaning of subdivision (9) of section 39 of this article if the general assembly authorizes by law that religious, charitable, fraternal, service or veteran organizations may conduct the game commonly known as bingo, upon the payment of the license fee and the issuance of the license as provided by law. Any such law shall include the following requirements:

. . . .

Clearly the amendment requires legislative implementation to authorize such bingo games. In the absence of such legislative authorization, the games would be prohibited under Chapter 572, RSMo, relating to gambling.

Whether or not a festival game or a county fair type game is illegal depends upon the precise nature of the game. Since we do not have detailed facts from you with regard to such activities, we cannot speculate as to the legality of such games.

Very truly yours,



JOHN ASHCROFT
Attorney General

EMPLOYMENT COMPENSATION,
CONSTITUTIONAL LAW,
STATE REVENUES:

Only such sums as are expended from the unemployment compensation fund for payment of administrative expenses pursuant to an appropriation by the legislature are properly includable in the definition of total state revenues found in Section 17, Article X of the Missouri Constitution.

March 13, 1981

OPINION NO. 71

Honorable Edwin L. Dirck
Room 420
Capitol Building
Jefferson City, Missouri 65101



Dear Senator Dirck:

You have requested an opinion as to whether unemployment compensation payments by contributing and reimbursing employers to the Division of Employment Security under Chapter 288 RSMo fall within the definition of total state revenues contained in Section 17, Article X of the Missouri Constitution adopted on November 4, 1980.

In pertinent part, Section 17, Article X provides as follows:

(1) 'Total state revenues' includes all general and special revenues, license and fees, excluding federal funds, ...

We note, first, that total state revenues is defined to include among other things, "all general and special revenues". We believe, therefore that the proper answer to your inquiry lies in a determination of whether unemployment compensation payments received by the Division of Employment Security may properly be termed general or special revenues.

Because the Hancock Amendment, enacted as Sections 16 through 24 of Article X, provides no further guidance as to the definition of "revenues", we may look to prior decisional law in this state to aid in interpretation.

Honorable Edwin L. Dirck

Not all money which the state or its agencies might touch constitutes revenue of the state or state money. Thompson v. Board of Regents for Northeast Missouri State Teachers' College, 264 S.W. 698 (Mo. banc 1924) involved a writ of mandamus sought by the state treasurer to compel the board of regents to pay into the state treasury proceeds of fire insurance policies purchased by the board from student fees. Relator insisted that the proceeds were state money and relied principally upon a provision of the 1875 Constitution which required that all revenue collected and money received by the state from any source whatsoever shall go into the state treasury. Were the proceeds "revenue collected by the state"?

By revenue, whether its meaning be measured by the general or the legal lexicographer, is meant the current income of the state from whatsoever source derived which is subject to appropriation for public use. (emphasis supplied)

The court continued:

... [N]o matter from what source derived, if required to be paid into the treasury, it becomes revenue or state money; its classification as such being dependent upon specific legislation enacted, or ... state money means money the state, in its sovereign capacity, is authorized to receive ... (emphasis supplied)

The language of the Thompson case, restricting revenue to those sums collected by the state and subject to appropriation for public purposes has been adopted without change in subsequent decisions. See Gass v. Gordon, 181 S.W. 1016 (Mo. 1915) (in which the court defined "revenue") and New Franklin School District #28 v. Bates, 225 S.W.2d 769 (Mo. 1950) (involving inclusions in "state revenue").

Honorable Edwin L. Dirck

By contrast, we note the peculiar treatment afforded the bulk of payments made under Missouri's unemployment compensation law, contained in Chapter 288 RSMo. Section 288.290 establishes "a special fund, separate and apart from all public moneys or funds of this state" into which contributions are deposited. The treasurer of the fund is not the state treasurer, but is instead an appointee of the director of Employment Security. Further, immediately after clearance - 48 hours in practice - all payments are deposited in the United States Treasury to the credit of the fund established by Section 288.290. Once deposited with the federal treasury, withdrawals may be effected only by requisition of the director and only for two purposes. The first of these is such payment of benefits as may be necessary, which payment is accomplished by the treasurer of the fund upon order of the director without benefit of legislative directive. The second relates to the payment of expenses incurred in connection with the administration of Chapter 288, which payment, however much be preceded by a specific appropriation by the legislature according to Section 288.290.5.

We conclude, therefore, that the portion of the unemployment compensation fund used to pay benefits under Chapter 288 does not constitute a general or special revenue of the state for purposes of Section 17, Article X of the Missouri Constitution. That portion of contributions to the unemployment compensation fund which - pursuant to an appropriation - goes to defray administrative expenses of the Division of Employment Security under Chapter 288, should be included in the computation of total state revenues.

CONCLUSION

It is the opinion of this office that only such sums as are expended from the unemployment compensation fund for payment of administrative expenses pursuant to an appropriation by the legislature are properly includable in the definition of total state revenues found in Section 17, Article X of the Missouri Constitution.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Christopher M. Lambrecht.

Very truly yours,



JOHN ASHCROFT
Attorney General

SCHOOLS:
DEPOSITARIES:
SCHOOL DISTRICTS:

Local school districts are not required to bid depositaries in accordance with the provisions of Chapter 165, RSMo, because it is "unlawful" for a banking institution to pay interest upon demand deposits.

May 6, 1981

OPINION NO. 72

Dr. Arthur L. Mallory
Commissioner of Education
6th Floor, Jefferson Building
Jefferson City, Missouri 65101



Dear Dr. Mallory:

Pursuant to § 27.040, RSMo, 1978, you have requested this office's formal opinion to the following question:

The Depository Institutions Deregulation and Monetary Control Act of 1980 (P.L. 96-221) authorizes depository institutions to pay interest on NOW (Negotiable Order of Withdrawal) accounts. Do the provisions of this act require local school districts to bid depositaries in accordance with the provisions of Sections 165.211 to 165.291, RSMo?

In general, depositaries in six-director districts shall be selected by bids from banking institutions in the county in which the school district is located. Section 165.211, RSMo Supp. 1980. However, § 165.201, RSMo, authorizes school districts to select depositaries without advertising for bids in the following instances:

If at the time bids should be received or the selection of depositaries should be made in six-director districts in accordance with the provisions of sections 165.211 to 165.291, it is unlawful for banking institutions to pay interest upon demand deposits, or if there is not a sufficient number of bids submitted, the board may name depositaries of all or any part, not less than one-sixteenth part thereof, of its funds, without

Dr. Arthur L. Mallory

advertising for bids and without requiring the payment of any interest. Each depository selected within ten days after its selection in accordance with the provisions of this section shall deposit securities required for the deposit of school funds as provided in sections 110.010 and 110.020, RSMo.

Therefore, the question you pose in your opinion request is dependent upon whether Public Law 96-221 which authorizes depository institutions to pay interest on NOW accounts makes it "lawful" for banking institutions to pay interest upon demand deposits.

A review of pertinent Missouri banking statutes reveals that the legality of paying interest upon deposits payable on demand is determined by authorization under the laws of the United States of America or by regulations issued under authority of these laws. Section 362.385. Although the term "demand deposit" is defined in § 362.010(4) as "deposits, payment of which can legally be required within thirty days," this definition only applies when the term is used in Chapter 362. See § 362.010. In Chapter 362, the term "demand deposit" is only used in the statutory sections dealing with legal reserve deposits. Therefore, it is necessary to determine whether under P.L. 96-221 and the regulations issued under authority of this law, authorize the payment of interest on demand deposits.

A review of P.L. 96-221 and the regulations promulgated thereto suggests that a NOW account does not involve the use of demand deposits, rather a NOW account is the use of savings deposits. A depository institution is authorized by 12 U.S.C. § 1832(a)(1):

[T]o permit the owner of a deposit or account on which interest or dividends are paid to make withdrawals by negotiable or transferable instruments for the purpose of making transfers to third parties.

However, 12 U.S.C. § 371a, still prohibits a member bank from paying interest on any deposit which is payable on demand. A "demand deposit" is defined as "every deposit which is not a 'time deposit' or 'savings deposit' as defined in 12 C.F.R. § 329.1 and 12 C.F.R. § 217.1." See, 12 C.F.R. § 329.1 and 12 C.F.R. § 217.1. The federal regulations on banks and banking further support the statutory prohibition against payment of interest on demand deposits. 12 C.F.R. § 329.2(a); 12 C.F.R. § 217.2(a).

Dr. Arthur L. Mallory

Contrarily, the code of federal regulations explicitly authorizes payment of interest on savings deposits. 12 C.F.R. § 329.1(e); 12 C.F.R. § 217.1(e). Savings deposits are defined to include:

[A]ll interest-bearing deposits subject to withdrawal by negotiable or transferrable interest for the purpose of making transfers to third parties where such withdrawals are authorized by law. (12 C.F.R. § 329.2(e)(2)(i); 12 C.F.R. § 217.1(e)(3).)

Therefore, a NOW account does not involve the use of demand deposits, rather the use of savings deposits.

This office does not pass on whether a local school district or any other governmental unit is eligible to hold a NOW account. However, a recent Federal Reserve press release, dated October 20, 1980, indicates that independent school districts are a category of depositors which are eligible to hold NOW accounts at member banks.

CONCLUSION

Therefore, it is the opinion of this office that local school districts are not required to bid depositaries in accordance with the provisions of Chapter 165, RSMo, because it is "unlawful" for a banking institution to pay interest upon demand deposits.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Leslie Ann Schneider.

Very truly yours,



JOHN ASHCROFT
Attorney General

MERIT SYSTEM:
STATE EMPLOYEES:
REORGANIZATION ACT:

Division directors of the Department
of Social Services may designate only
one exempt assistant pursuant to §
36.030.1(1), RSMo Supp. 1980.

April 2, 1981

OPINION NO. 73

Mr. Stephen C. Bradford
Commissioner of Administration
Room 125, State Capitol Building
Jefferson City, MO 65101

Dear Commissioner Bradford:

This is in response to your request for an opinion asking
the following questions:

- a. Section 36.030 RSMo as revised by CCS
for HB673, effective September 28, 1979
contains an enumeration of offices and
positions not subject to the State Per-
sonnel Law and which may be filled with-
out regard to its provisions. Does this
enumeration of 'exempt' positions replace
or supersede the exceptions from coverage
of the provisions of Chapter 36 RSMo spec-
ified for the Department of Social Services
in Section 13.1 of the Omnibus Reorganiza-
tion Act of 1974?
- b. If the provisions of Section 36.030.1 as
revised by CCS for HB673 in 1979 do not
replace or supersede the exceptions from
coverage of the provisions of Chapter 36
RSMo contained in Section 13.1 of the Om-
nibus Reorganization Act of 1974, must
all employees of the Department of Social
Services be covered by the merit system
unless specifically excepted by Section
13.1? (Underscoring in original)

Your office has succinctly stated the facts which appear as
follows:

- a. Section 13.1 of the Omnibus State Reor-
ganization Act of 1974 created the Depart-
ment of Social Services and placed all

Mr. Stephen C. Bradford

employees of that department under the provisions of Chapter 36 RSMo 'except the director of the department and his secretary, all division directors and their secretaries, and no more than three additional positions in each division which may be designated by the division director'. (emphasis added)

- b. The exemptions from merit system coverage specified in Section 13.1 of the Reorganization Act for the Department of Social Services were different from the exemptions provided in Section 36.030 RSMo for other state agencies in that three positions could be so designated by the director of each division. Also a number of specific exemptions (attorneys, chaplains, academic interns, etc.) in Section 36.030 were not repeated in the Reorganization Act.
- c. At the time of the enactment of the Reorganization Act there was no mention in Chapter 36 RSMo itself of merit system coverage for the new Department of Social Services even though Chapter 36 RSMo was revised in the same special session which passed the Reorganization Act.
- d. In 1979, Chapter 36 RSMo, previously known as the State Merit System Law, was substantially revised by CCS for HB673 and became the State Personnel Law. Section 36.030 subsection 1 was revised to specifically include the Department of Social Services under the provisions of Chapter 36 RSMo. The offices and positions not subject to (or exempt from) the provisions of Chapter 36 RSMo were re-defined for all covered agencies. These exemptions included a number of positions which were not so exempted by Section 13.1 of the Reorganization Act, including attorneys, chaplains, academic interns, three principal assistants for department heads, and deputies and institution heads as approved by the Personnel Advisory Board. In one respect, however, the new State Personnel Law is more restrictive than the Reorganization

Mr. Stephen C. Bradford

Act. Section 36.030.1(1) 'other provisions of law notwithstanding', allows a division head to name only one exempt 'assistant' rather than 'three additional positions'.

Section 36.030, RSMo Supp. 1980, states in pertinent part:

1. A system of personnel administration based on merit principles and designed to secure efficient administration is established for all offices, positions and employees, except attorneys, of the department of social services, . . . except that the following offices and positions of these agencies are not subject to this law and may be filled without regard to its provisions:

(1) Other provisions of the law notwithstanding, . . . departmental directors, three principal assistants designated by the departmental directors, division directors, one assistant designated by each division director, . . .

* * *

(10) A deputy or deputies to the exempt head of each division of service, as warranted by the size or complexity of the organization and in accordance with the rules promulgated by the personnel advisory board, and one secretary for each deputy so exempted; provided, however, that merit status will be retained by present incumbents of these positions and all other positions identified in this section which have previously been subject to this law.

2. All positions in the executive branch transferred to coverage under this chapter where incumbents of such positions have at least twelve months' prior service on the effective date of such transfer shall have incumbency preference and shall be permitted to retain their positions, provided they meet qualification standards acceptable to the personnel division of the office of administration. An employee with less than twelve months of prior service on the effective date of such transfer or an employee who is appointed to such position after the effective date of such transfer and prior to the classification

Mr. Stephen C. Bradford

and allocation of the position by the personnel division shall be permitted to retain his position, providing he meets acceptable qualification standards and subject to successful completion of a working test period which shall not exceed twelve months of total service in the position. After the allocation of any position to an established classification, such position shall thereafter be filled only in accordance with all provisions of this chapter. (Underscoring added)

Section 13.1 of the Omnibus State Reorganization Act of 1974, Appendix B, RSMo 1978, states in pertinent part:

All employees of the department of social services shall be covered by the provisions of chapter 36, RSMo, except the director of the department and his secretary, all division directors and their secretaries, and no more than three additional positions in each division which may be designated by the division director. (Underscoring added)

This last quoted provision of law was enacted in the Laws of 1973, First Extra Session, S.B. 1, Section 13, effective May 2, 1974.

Clearly, the legislature intended to make a substantive change by the repeal and reenactment of § 36.030 in 1979. The legislative intent is gleaned from such repeal and reenactment. Additionally, the rules of construction tell us that the words and phrases shall be taken in their plain and ordinary and usual sense. See, § 1.090, RSMo 1978. If the words are unambiguous, then the statutes which are amended should be construed on the belief that the lawmakers intended to accomplish something through the amendment. We look at the plain language of the statutes to determine the accomplishment. See, State ex rel. Miller v. Crist, 579 S.W.2d 837 (Mo.App., W.D. 1979); Wilson v. McNeal, 575 S.W.2d 802 (Mo.App., St.L.D. 1978).

An examination of the above-quoted language of Section 13.1 of the Omnibus State Reorganization Act of 1974 indicates that some of the provisions of such section specifically conflict with the language in § 36.030.1(1). Section 36.030.1(1) being the later enactment, its provisions prevail over conflicting provisions of Section 13.1 of the Omnibus State Reorganization Act of 1974 and, therefore, there can be no doubt but that the legislature intended that division directors in the Department of Social Services be permitted to designate only one exempt assistant. It is also clear

Mr. Stephen C. Bradford

that the department director may exempt three principal assistants under the clear provisions of § 36.030.1(1).

CONCLUSION

It is the opinion of this office that division directors of the Department of Social Services may designate only one exempt assistant pursuant to § 36.030.1(1), RSMo Supp. 1980.

Yours very truly,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

June 9, 1981

OPINION LETTER NO. 76
(Answered by letter-Klaffenbach)

The Honorable James R. Strong
Representative, 119th District
House of Representatives
Room 105D, State Capitol Bldg.
Jefferson City, Missouri 65101



Dear Representative Strong:

This is in response to your request for an official legal opinion of this office pursuant to § 27.040, RSMo 1978, based upon the following questions:

Several state employees holding positions in state government created by statute are required to devote 'full-time' or their 'entire time' to their official duties. See §216.110 and §216.290, RSMo 1978 as examples. There are hundreds of other examples throughout the statutes.

1. As used in the aforementioned statutes does the requirement to devote 'full-time' or words of similar import implicitly require that such state officials or employees not hold any outside employment of any nature nor receive consideration for any service rendered?

2. In the alternative and again as used in the aforementioned statutes does the requirement to devote 'full-time' simply imply that the official or employee must devote approximately forty hours per week in his employment and not pursue other full-time employment?

The Honorable James R. Strong

3. Can a chaplain employed at the Missouri Intermediate Reformatory pursue part-time employment as a pastor of a church? See §216.290 RSMo.

4. Does §216.290 RSMo violate the United States Constitutional guarantee of protection for religious freedom or freedom of speech in respect to the prohibition against serving as a pastor of a church?

Section 216.110, RSMo, to which you refer provides in part:

1. The chief administrative officer of the division of corrections shall be the director of the division of corrections. . . .

* * *

4. The director shall devote his entire time to his official duties.

Section 216.290, RSMo, to which you refer provides in part:

The [state penitentiary and intermediate reformatory institution] chaplains shall:

(1) Devote their entire time to the work of the institutions and shall not regularly officiate in the capacity of minister or clergyman outside the institutions to which they are assigned;

In answer to your first and second questions, we enclose a copy of Attorney General Opinion 130-1966, which is self-explanatory.

In answer to your third question, we believe it is evident that the legislature in § 216.290 has prohibited such chaplains from regularly officiating in the capacity of minister or clergyman outside of the institutions to which they are assigned.

The Honorable James R. Strong

In answer to your fourth question, it is clear that the constitutionality of a statute is presumed. It is the policy of this office not to issue opinions regarding the constitutionality of a statute unless the statute is clearly in violation of a constitutional provision. We see no clear violation of a constitutional provision with respect to such statutory prohibition.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft", followed by a horizontal line.

JOHN ASHCROFT
Attorney General

Enc: Atty. Gen. Op. No. 130
Sloan, 3/22/66

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

March 20, 1981

OPINION LETTER NO. 77

The Honorable Jerry E. McBride
Representative, District 130
Room 414B, Capitol Building
Jefferson City, Missouri 65101

Dear Mr. McBride:

This letter is in response to your questions asking:

1. Is it proper that a county sheriff refuse to serve process in either a criminal or civil case unless a deposit of such an amount as determined by the sheriff has been made by the requesting authority?
2. In counties of the third class, does section 57.280 RSMo Supp. 1980 provide for sheriff's fees in criminal cases or must the fees set forth in section 57.290 RSMo Supp. 1980 be used?
3. What fee is allowed a sheriff for serving a warrant in a criminal case?
4. What fee is allowed a sheriff for serving a summons as provided by Supreme Court Rule 21.03 in a criminal case?
5. What fee is allowed a sheriff for each return for non est on a summons as provided by Supreme Court Rule 21.03 in a criminal case?

In answer to that part of your first question asking whether the sheriff has authority to require the payment of a deposit before service is rendered in civil cases, we enclose

The Honorable Jerry E. McBride

copies of our Opinions No. 32, 4/14/39, Gerster, and No. 44, 10/22/45, Impey, both of which concluded that the sheriff is not entitled to a fee for services rendered until the litigation is ended.

Insofar as your first question concerns the service of process in criminal cases, we point out that Chapter 550, RSMo, governs the determination of costs in criminal cases, and therefore the sheriff in cases in which costs are determined pursuant to Chapter 550, RSMo, would not have the right to require payment of the fee prior to rendering the service.

Therefore, in the absence of a clear provision authorizing the sheriff to require the payment of a fee or deposit before services are rendered, sheriffs are not entitled to refuse to serve process because a deposit or prepayment has not been made as determined by the sheriff.

Your second question asks whether in counties of the third class, § 57.280, RSMo Supp. 1980, provides for sheriff's fees in criminal cases or whether such fees come under § 57.290, RSMo Supp. 1980. It is our view that § 57.290 relates to fees in criminal cases, and § 57.280 relates only to fees in civil cases.

Your third question asks what fee is allowed a sheriff for serving a warrant in a criminal case. Section 57.290 provides for a two dollar fee for serving and returning each capias for each defendant and provides a five dollar fee for serving a writ of attachment for each person actually brought into court. Prior to the amendment of § 57.290, that section provided a one dollar fee for either serving a capias or for serving a writ of attachment, and therefore it appears the question did not seem important until the amendment. It has been held that the word "capias" includes a warrant of arrest, Miller County v. Magee, 7 S.W.2d 973, 975 (Ark. Supp. 1928). It is our view that the two dollar fee for serving a capias under § 57.290 is the fee which is to be charged for serving a warrant of arrest in a criminal case.

Your fourth question asks what fee a sheriff is allowed for serving a summons as provided by Supreme Court Rule 21.03 in a criminal case. Rule 21.03 provides:

Upon the filing of an information or the return of an indictment charging the commission of a misdemeanor a summons shall be issued unless there is reasonable ground

The Honorable Jerry E. McBride

for the court to believe that the defendant will not appear on the summons in which event a warrant of arrest for the defendant shall be issued.

It seems clear that Supreme Court Rule 21.03 makes a distinction between the issuance of a summons and a warrant of arrest. Section 57.290 does not provide for any fee to be charged for the issuance of a summons to such a defendant. However, § 57.290 provides a one dollar fee for serving any rule of court or notice. It is our view that the service of such a summons constitutes the service of a notice under the provision of § 57.290 authorizing a one dollar fee for the service of any notice, and therefore, the one dollar fee should be charged for serving such a summons.

Your fifth question asks what fee is to be charged a sheriff for each return of a non est on a summons under Supreme Court Rule 21.03 in a criminal case. Section 57.290 does not provide for any such fee, and we know of no statutory provision which does so provide. Therefore, it is our view that no fee can be charged for a return of a non est on a summons in a criminal case under Supreme Court Rule 21.03.

Very truly yours,



JOHN ASHCROFT
Assistant Attorney General

Enclosures

Att'y Gen. Op. No. 32,
Gerster, 4/14/39
Att'y Gen. Op. No. 44,
Impey, 10/22/45

March 5, 1981

OPINION LETTER NO. 80
Answer by letter-Allen

Dr. James F. Antonio
State Auditor
State Capitol Building
Jefferson City, MO 65101

FILED
80

Dear Dr. Antonio:

This letter is in response to your questions asking whether the county collector in a nontownship county is entitled to a commission for collecting payments in lieu of taxes received from the Missouri Conservation Commission and in a township county who, if anyone, is entitled to a commission for collecting the grants in lieu of taxes received from the Missouri Conservation Commission.

The facts appears to be that on November 4, 1980, Constitutional Amendment No. 4 was approved by the voters of Missouri. This is currently Art. IV, § 43(b), Mo. Constitution. The amendment provides for payment by the Missouri Conservation Commission to be made to counties in lieu of taxes on Commission lands and forest croplands for distribution to the appropriate political subdivisions.

The constitutional amendment, as above cited, does not create a tax. All properties of the state are exempt from taxation. Moreover, public officers are not entitled to a fee or compensation unless it is provided in the statutes of the state. See, Gammon v. Lafayette County, 76 Mo. 675 (1882); King v. Riverland Levee Dist., 218 Mo.App. 490, 279 S.W. 195 (St.L. 1926); Becker v. St. Francois County, 421 S.W.2d 779 (Mo. 1967). The right of a public officer to fees is derived from the statutes. When the statute fails to provide a fee for his services, he is required to perform as a public officer and he has no claim on the state for compensation therefor. A public officer claiming compensation for official duties must point out the statute authorizing such payment. Nodaway County v. Kidder, 344 Mo. 795, 129 S.W.2d 857 (1939). We find no provision for payment of a commission or fee for collecting the payment by the Missouri Conservation Commission in lieu of taxes. Therefore, it appears to us that there is

Dr. James F. Antonio

no basis for any officer in any county to receive a commission on the payments in lieu of taxes that have been made to the counties pursuant to Art. IV, § 43(b), Mo. Constitution.

Yours very truly,

A handwritten signature in cursive script, reading "John Ashcroft". The signature is written in dark ink and is positioned above the printed name and title.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

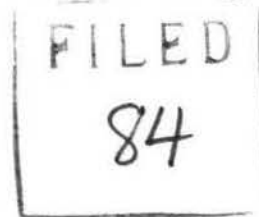
65102

(314) 751-3321

February 25, 1981

OPINION LETTER NO. 84
(Answer by Letter-Klaffenbach)

The Honorable Fred Lynn
Representative, Greene County
Room 115H, Capitol Building
House Post Office
Jefferson City, Missouri 65101



Dear Mr. Lynn:

This letter is in response to your question asking whether the City of Springfield has the authority to give a cost of living increase to policemen and firemen who are presently employed by the city to become effective upon their retirement and to be paid out of the policemen and firemen's pension fund.

It is our understanding that the City of Springfield is a constitutional charter city.

Section 19(a) of Article VI of the Missouri Constitution provides:

Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law.

We know of no constitutional or statutory objection to the City of Springfield providing such a cost of living increase to such policemen and firemen who are employed by the

The Honorable Fred Lynn

city and who have not retired prior to the effective date of the ordinance authorizing such cost of living increase.

Such an increase given to policemen or firemen who have already retired would be constitutionally objectionable. Police Retirement System v. Kansas City, 529 S.W.2d 388 (Mo. 1975).

We do not here purport to rule on any question as to whether or not there is any impediment in the city charter to the enactment of such provisions.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

March 11, 1981

OPINION LETTER NO. 85

(Answer by Letter-Downey)

The Honorable Harold L. Lowenstein
Representative, District 34
House Post Office, Capitol Building
Jefferson City, Missouri 65101

FILED

85

Dear Mr. Lowenstein:

This letter is in response to your question asking:

Because of the extremely high cost of conducting an election, is the Jackson County Election Board, under the Comprehensive Election Act, Chapter 115, R.S.Mo. (1978), empowered to combine 11 precincts existing in Jackson County Water District No. 1 into a single polling place when there are no other issues before the voters in order to minimize the cost of the election to the water district and its consumers?

You also state:

The Jackson County Public Water Supply District No. 1 is required under Chapter 247 R.S.Mo. (1978) to elect directors to serve on the water district board on an annual basis, pursuant to Section 247.060 R.S.Mo. and the original, staggered board members term establish by the Circuit Court at the inception of the water district. Under the Comprehensive Election Law (Chapter 115) the election is held under the aegis of the Jackson County Election Commission. That commission has the statutory power to establish election procedure and polling places. For approximately 35 years, voting in

The Honorable Harold L. Lowenstein

water district elections has been done at a single polling place; however, the Jackson County Election Commission is now requiring the water district to establish from 3 to 11 polling places at an expense of between \$2,300.00 and \$4,000.00, even when there are no election issues before the public other than the election of water district directors.

Since 1977 an average of 79 persons have voted in each water district election. Therefore, under the Jackson County Election Commission requirements, the water district can reasonably expect to pay between \$29.10 and \$50.63 for each vote cast.

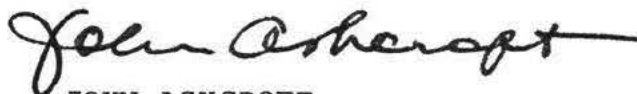
Section 115.115, RSMo 1978 provides:

Except as provided in subsection 2 of this section, for each election within its jurisdiction, the election authority shall designate a polling place for each precinct within which any voter is entitled to vote at the election.

For any election, the election authority shall have the right to consolidate two or more adjoining precincts for voting at a single polling place and to designate one set of judges to conduct the election for such precincts. Voters shall be notified of the place for voting in the manner provided in Section 115.129 or 115.131.

In light of the above statute, it is clear that the Jackson County Election Board is empowered to combine the 11 precincts existing in the Jackson County Water District No. 1 into a single polling place.

Very truly yours,



JOHN ASHCROFT
Attorney General

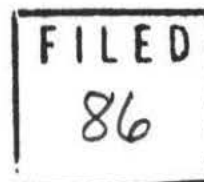
JA:bw

SHERIFFS: A contract entered into with the United States
COUNTIES: Secretary of the Army under § 57.109, RSMo Supp.
COUNTY COURT: 1980, for special law enforcement services by a
sheriff must have the approval of the county
court. The sheriff does not receive any addi-
tional compensation for the performance of such
services, although the contract may contain provisions for direct
reimbursement of mileage expense for the sheriff or his deputies
using personal vehicles.

May 27, 1981

OPINION NO. 86

The Honorable Harold Caskey
Senator, District 31
Room 320, Capitol Building
Jefferson City, Missouri 65101



Dear Senator Caskey:

This opinion is in response to your questions asking:

- (1) Section 57.109, RSMo Supp. 1980, authorizes sheriffs to contract with the U.S. Secretary of the Army for the purpose of providing increased law enforcement services at or near water resources development projects which are under the jurisdiction of the Secretary and which are contained within the county of the contracting sheriff. Can the funds derived from such a contract be retained by the sheriff to supplement his income or must they be deposited in the county's general revenue fund?
- (2) Section 57.430, RSMo Supp. 1980, delineates the procedures to be followed by sheriffs in third and fourth class counties in filing for reimbursement for mileage expenses. Sections 57.280, 57.290 and 57.300, RSMo 1978, detail the fees, including mileage, which can be charged by sheriffs in civil and criminal proceedings. Can a sheriff charge for mileage, the reimbursement to be retained by him, accumulated by cars which he owns and which he provides to employees added because of a contract with the Secretary of the Army (Section 57.109, RSMo Supp. 1980)?

The Honorable Harold Caskey

Section 57.109, RSMo Supp. 1980, to which you refer provides:

1. Every sheriff shall have the power to contract with the Secretary of the Army of the United States, acting through the Corps of Engineers, for the purpose of providing increased law enforcement services at or near water resources development projects, active or inactive, under the jurisdiction of the Secretary of the Army which are located within the county of the contracting sheriff.
2. No such contracts shall be for a period of more than two years.

In answer to your first question, it is our view that § 57.109 pertains to official services of the sheriff, and therefore, funds received pursuant to contract, except for funds of a reimbursement nature, must be deposited in the county general revenue fund. There is no statutory provision authorizing the sheriff to receive additional compensation for rendering such services. Further, the compensation of sheriffs in criminal matters can only be by salary and any fees and charges collected by such officers must be paid into the general revenue fund of the county under § 13 of Art. VI of the Missouri Constitution.

In answer to your second question, we find no statute specifically providing for payment of the additional mileage in personal vehicles which the sheriffs or their deputies in third and fourth class counties may incur in providing services under a contract executed pursuant to § 57.109. It is our view, however, that the contract should contain appropriate provisions for direct mileage reimbursement to the sheriff and his deputies by the Secretary of the Army where the use of personal vehicles is involved. The reimbursement of mileage to such officers under such circumstances, unless excessive, does not constitute additional compensation.

It should be additionally noted that § 57.109 authorizes such sheriffs to enter into such contracts. However, § 7 of Art. VI of the Missouri Constitution provides:

The Honorable Harold Caskey

In each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business as prescribed by law, and keep an accurate record of its proceedings. The voters of any county may reduce the number of members to one or two as provided by law.

Likewise, it is quite clear that the legislature has given the county courts authority to control the real and personal property of the county under § 49.270, RSMo, as well as the option of providing law enforcement vehicles under § 49.276 in third and fourth class counties. Thus, there is no doubt that the county involved will have a direct constitutional and statutory interest in such contracts. Therefore, it is our view that notwithstanding the provisions of § 57.109 authorizing the sheriff to enter into such contracts, it is clear that the county court is also a necessary party to such contracts.

CONCLUSION

It is the opinion of this office that a contract entered into with the United States Secretary of the Army under § 57.109, RSMo Supp. 1980, for special law enforcement services by a sheriff must have the approval of the county court. The sheriff does not receive any additional compensation for the performance of such services, although the contract may contain provisions for direct reimbursement of mileage expense for the sheriff or his deputies using personal vehicles.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,



JOHN ASHCROFT
Attorney General

EMPLOYMENT SECURITY: The half percent increase in the employer's contribution to the unemployment compensation fund under § 288.123, RSMo Supp. 1980, is effective for the quarter following the ensuing quarter after any quarter in which the cash balance in the unemployment fund on any day is below 150 million dollars, but is not a cumulative increase.

February 24, 1981

OPINION NO. 87

The Honorable Richard M. Webster
Senator, 32nd District
Senate Post Office, Capitol Bldg.
Jefferson City, Missouri 65101

Dear Senator Webster:

This opinion is in response to your question asking whether an increase in the rate of payment to the unemployment compensation fund under § 288.123, RSMo Supp. 1980, is triggered each quarter the balance in the fund on any day of the quarter is less than 150 million dollars.

Section 288.123, RSMo Supp. 1980, provides:

If on any day of any calendar quarter the cash balance in the unemployment compensation fund is less than one hundred fifty million dollars, then each employer's rate for the quarter following the ensuing calendar quarter shall be increased by five-tenths of one percent.

The above section became effective January 1, 1980, and we have no judicial precedent to guide us. However, it seems clear that when the cash balance in the fund is less than 150 million dollars, the employer's rate goes up a half percent for the quarter following the ensuing calendar quarter. The employer's rates generally are fixed by other sections in Chapter 288, and the increase would never exceed a half percent even though there might be a balance in the unemployment compensation fund of less than 150 million dollars for two or more successive quarters.

Therefore, in our view, the half percent increase which is occasioned by such a drop in the unemployment compensation fund is not cumulative. If during any quarter the cash balance never on any day falls below 150 million dollars, there shall not be collected the half percent additional tax for the quarter following the ensuing calendar quarter.

The Honorable Richard M. Webster

CONCLUSION

It is the opinion of this office that the half percent increase in the employer's contribution to the unemployment compensation fund under § 288.123, RSMo Supp. 1980, is effective for the quarter following the ensuing quarter after any quarter in which the cash balance in the unemployment fund on any day is below 150 million dollars, but is not a cumulative increase.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in black ink, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

March 3, 1981

OPINION LETTER NO. 88
(Answer by Letter-Klaffenbach)

The Honorable Gary D. Sharpe
State Representative, District 13
3305 Pershing Avenue
Hannibal, Missouri 63401

FILED
88

Dear Mr. Sharpe:

This letter is in response to your questions asking:

Is it legal (according to the Constitution of Missouri, Article VI, Section 25) for the City of Hannibal to grant money to the Senior Citizen Center, Inc.-Mark Twain (a not-for-profit corporation)... and/or...can the city of Hannibal contract with Senior Citizens Center, Inc.-Mark Twain to pay monetary benefits for providing services to senior citizens?

In our Opinion No. 98, dated May 25, 1977, to Mueller, we concluded that a fourth class city has authority to provide for the relief of its poor inhabitants. We note that the city of Hannibal is a constitutional charter city and assuming that there are no restrictions in its charter, such city would, of course, also have the authority to provide for the relief of its poor inhabitants. However, we also concluded in our Opinion No. 69, dated February 11, 1974, to Marshall, that § 25 of Art. VI of the Missouri Constitution prohibits the appropriation of public moneys to a private corporation and to like effect § 23 of Art. VI of the Missouri Constitution prohibits the use of public funds to aid private corporations.

Likewise in our Opinion No. 9, dated September 27, 1979, to Antonio, we concluded that, because of the same constitutional prohibitions, a third class city does not have authority to donate money to private, not for profit corporations.

We have enclosed copies of these opinions.

The Honorable Gary D. Sharpe

We believe it follows that the city of Hannibal does not have authority to make grants to such an entity.

Whether the city has the authority to contract with such an entity for services to senior citizens depends on the nature of the contract and whether the services are for indigent citizens. You have not furnished us with sufficient facts to make a determination of this question.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosures:

Att'y Gen. Op. No. 98,
Mueller, 5/25/77
Att'y Gen. Op. No. 69,
Marshall, 2/11/74
Att'y Gen. Op. No. 9,
Antonio, 9/27/79

June 8, 1981

OPINION LETTER NO. 89
(Answered by letter--Klaffenbach)

The Honorable William R. O'Toole
State Representative
97th District
Room 408, Captiol Building
Jefferson City, Missouri 65101



Dear Representative O'Toole:

This letter is in response to your question asking whether § 21.150, RSMo 1978, which authorizes the employment of chaplains by the legislature violates any provision of the Constitution of the United States.

It is a basic rule that an act of the legislature is presumed to be valid and will not be declared unconstitutional unless it clearly and undoubtedly contravenes some constitutional provision. American United v. Rogers, 538 S.W.2d 711 (Mo. banc 1976). It is our view that there are reasonable arguments which can be made in support of the validity of § 21.150.

Further, it should be noted that this office has no authority to declare a state statute invalid. Gershman Investment Corp. v. Danforth, 517 S.W.2d 33 (Mo. banc 1974). However this office does have a duty to defend state statutes.

Therefore, since reasonable arguments exist to support the validity of § 21.150 and in light of the legal responsibility of this office to defend acts of the legislature, we presume the validity of the statute. Because it is the position of this office that the statute in question is valid, if the constitutionality of § 21.150 is challenged in court, we will defend and support its constitutionality.

Very truly yours,

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

March 23, 1981

OPINION LETTER NO. 90

(Answer by Letter-Klaffenbach)

FILED

90

The Honorable Lester Patterson
Representative, 44th District
803 Cedar
Lee's Summit, Missouri 64063

Dear Mr. Patterson:

This letter is in response to your question asking:

Section 307.175, RSMo 1978, in the first sentence refers to 'ambulance association.' Is an ambulance district organized under Chapter 190, RSMo, considered an 'ambulance association' insofar as Section 307.175, RSMo, is concerned?

Section 307.175, RSMo, provides:

Motor vehicles and equipment which are operated by any member of an organized fire department or ambulance association, whether paid or volunteer, may be operated on streets and highways in this state as an emergency vehicle under the provisions of 304.022, RSMo, while responding to a fire call or ambulance call or at the scene of a fire call or ambulance call and while using or sounding a warning siren and while using or displaying thereon fixed, flashing or rotating blue lights, but sirens and blue lights shall be used only in bona fide emergencies. Permits for the operation of such vehicles equipped with sirens or blue lights shall be in writing and shall be issued and may be revoked by the chief of an organized fire department or organized ambulance association and no person

The Honorable Lester Patterson

shall use or display a siren or blue lights on a motor vehicle and fire or ambulance equipment without a valid permit authorizing the use. Permit to use a siren or lights as heretofore set out does not relieve the operator of the vehicle so equipped with complying with all other traffic laws and regulations. Violation of this section constitutes a misdemeanor. (Emphasis added)

It is our view that the term "ambulance association" as used in § 307.175 should not be given a meaning which would be unduly restrictive and which would require that we reach an absurd result. The term "association" is often used in a generic or a general sense, and it is our view that it should be given a general meaning in order that § 307.175 may be given an interpretation consistent with the clear legislative intent in using such term. Thus, it is our opinion that such an ambulance district comes within the term "ambulance association" and is therefore within the provisions of § 307.175.

For your further information, we enclose a copy of Opinion No. 152-1972, which is self-explanatory.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosure
Att'y Gen. Op. No. 152,
Grellner, 6/20/72

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

65102

(314) 751-3321

March 6, 1981

OPINION LETTER NO. 91
(Answer by Letter-Klaffenbach)

The Honorable Robert B. Langworthy
Linde, Thomson, Fairchild, et al.
Attorneys for the Board of Election
Commissioners-Kansas City
City Center Square, 27th Floor
Post Office Box 26010
Kansas City, Missouri 64196



Dear Mr. Langworthy:

This letter is in response to your question asking whether 15 CSR 30-10.060(9) authorizes a board of election commissioners to use ballots cast in a general election to test the accuracy of new and unused automatic tabulating equipment.

The rule to which you refer provides:

(9) The election authority may, at his discretion (at any time following a recount, or the last day to demand a recount if none is demanded), conduct an audit of any precinct or precincts.

It is our view that this rule does not authorize such a test.

Additionally, we note that although there is statutory authority for other tests, §§ 115.233 and 115.479, RSMo, there is no specific statutory authority for the test to which you refer.

We conclude that the board of election commissioners does not have authority to use ballots cast in a general election to test the accuracy of new and unused automatic tabulating equipment.

Very truly yours,

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

65102

(314) 751-3321

June 16, 1981

OPINION LETTER NO. 92

(Answered by letter--Klaffenbach)

The Honorable Paul Bradshaw
Senator, 30th District
Room 426, Capitol Building
Jefferson City, Missouri 65101



Dear Senator Bradshaw:

This letter is in response to your question asking:

Under sections 550.040, RSMo 1978, and 552.080, RSMo Supp. 1980, are counties potentially liable for the costs of mental examination and treatment of criminal defendants who are acquitted.

Section 550.040, RSMo, provides:

In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law.

Section 552.080, RSMo Supp. 1980, provides in pertinent part:

1. Notwithstanding any other provisions of law, the court in which the proceedings are pending shall, upon application and approval, order the payment of or tax as

costs the following expenses and fees, which in each case shall be reasonable, and so found by the court:

(1) Expenses and fees for examinations, reports and expert testimony of private psychiatrists who are neither employees nor contractors of the department of mental health for purposes of performing such services and who are appointed by the court to examine the accused under sections 552.020 and 552.030;

(2) The expenses of conveying any prisoner from a jail to a facility of the department of mental health and the expense of returning him to a jail under the provisions of section [sic] 552.020, 552.030, 552.040 or 552.050.

Such expenses and fees shall be paid, no matter how taxed as costs or collected, by the state, county or defendant, when liable for such costs under the provisions of chapter 550, RSMo. Such order may be made at any time before or after the final disposition of the case and whether or not the accused is convicted or sentenced to the custody of the division of corrections or county jail, as the case may be, or placed upon probation or granted parole.

2. The expenses and fees provided in subsection 1 of this section may be levied and collected under execution, except that, if the state or county has by inadvertence or mistake paid expenses or fees as provided in subsection 1 of this section, the political entity having made such a mistake or inadvertent payment shall be entitled to recover the same from the entity responsible for such payment.

The Honorable Paul Bradshaw

The above-quoted provisions of § 552.080 are the only provisions of that section which place any responsibility upon the counties which are liable for costs under § 550.040 for the payment of costs in criminal cases involving mental disease or defect.

Therefore, counties might be responsible for the payment of expenses and fees for examinations, reports, and expert testimony of private psychiatrists under subdivision (1) of subsection 1, § 552.080, and for the expenses of conveying a prisoner under subdivision (2) of subsection 1, § 552.080. However, § 552.080 does not purport to make the counties responsible for expenses or fees for examinations, reports, or expert testimony of physicians who are employees or contractors of the department of mental health and does not create any liability on the counties for the treatment of criminal defendants who are acquitted by reason of mental disease or defect. Further, we know of no provisions which would create such liability.

Under § 550.040, RSMo, counties would only pay the costs in those cases where defendants are acquitted which are not capital cases or cases in which imprisonment in the penitentiary is not the sole punishment for the offense. Thus, the state would be paying for expenses and fees for examinations, reports, and expert testimony of private psychiatrists under subdivision (1) of subsection 1, § 552.080, and for the expenses of conveying a prisoner under subdivision (2) of subsection 1, § 552.080, if the persons acquitted were charged with a capital offense or an offense in which imprisonment in the penitentiary was the sole punishment.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

March 4, 1981

OPINION LETTER NO. 93

Mr. Fred A. Lafser, Director
Department of Natural Resources
1915 Southridge Drive
Jefferson City, Missouri 65101

Dear Mr. Lafser:

This letter is in response to your questions asking:

Pursuant to Article III Section 47 of the Missouri Constitution regarding appropriations for state parks, must the General Assembly appropriate in a current appropriations period at least the same amount of funds as it appropriated in the previous appropriations period?

Does the amount required to be appropriated by Section 47 of Article III of the Missouri Constitution include appropriations designated for capital improvements of State Parks and State Park property?

Does said appropriation consist solely of general revenue? Shall said appropriation also include sources of funding such as the state park earnings fund and federal funds?

Section 47, Art. III, of the Missouri Constitution states:

Mr. Fred A. Lafser, Director

For twelve years beginning with the year 1961, the general assembly shall appropriate for each year out of the general revenue fund, an amount not less than that produced annually at a tax rate of one cent on each one hundred dollars assessed valuation of the real and tangible personal property taxable by the state, for the exclusive purpose of providing a state park fund to be expended and used by the agency authorized by law to control and supervise state parks, and historic sites of the state, for the purposes of the acquisition, supervision, operation, maintenance, development, control, regulation and restoration of state parks and state park property, as may be determined by such agency; and thereafter the general assembly shall appropriate such amounts as may be reasonably necessary for such purposes.

The amount required to be appropriated by this section may be reduced to meet budgetary demands provided said appropriation is not less than that appropriated for the prior similar appropriation period.

In our view the only part of § 47 which is presently effective is the phrase we have underscored. The second paragraph of § 47 relates to the formula provision contained in the first paragraph of § 47 which no longer applies.

Therefore, we conclude that the appropriation for state parks can be less than that appropriated in previous periods. It need be only the amount believed reasonably necessary by the general assembly. The appropriation for parks under Art. III, § 47 includes the amounts for capital improvements and can be made up of funds other than general revenue.

Very truly yours,

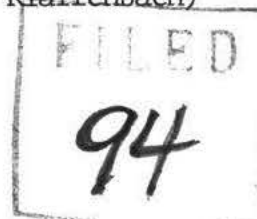
A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, sweeping flourish at the end.

JOHN ASHCROFT
Attorney General

March 10, 1981

OPINION LETTER NO. 94
(Answer by letter-Klaffenbach)

The Honorable Al Nilges
Representative, District 126
Room 413, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Nilges:

You have asked whether the provisions of Senate Bill 835 as approved by the Governor in June of 1980 granting state assistance to nonpublic private corporations violates the provisions of Article III, § 38(a) of the Missouri Constitution (or any other statute or part of the constitution) allowing the use of state funds or credit to private persons.

In the alternative you have asked if the production of educational television is a public purpose within the meaning of the constitution so as to be eligible for state funding.

This is essentially the same question, that is, whether the statute in question is unconstitutional. The statute is now § 37.200, et seq. of the Revised Statutes.

The courts of Missouri have consistently held that Missouri statutes are presumed to be constitutional and that a burden exists on any person to prove that a statute is unconstitutional. There is a strong presumption that the legislature did not act in violation of the constitutional law of the state. Typical of cases holding this presumption exists are the following: State ex rel. McClellan v. Godfrey, 519 S.W.2d 4 (Mo. banc 1975); State ex rel. Farm Electric Coop., Inc. v. State Environmental Improvement Authority, 518 S.W.2d 68 (Mo. banc 1975); State v. McQueen, 378 S.W.2d 449 (Mo. banc 1964); State v. Gunn, 326 S.W.2d 319 (Mo. banc 1959); and Wiles v. Williams, 133 S.W. 1 (Mo. 1910). Following these decisions, the statute in question

The Honorable Al Nilges

would be presumed to be constitutional. Further, this office is not empowered to declare a statute unconstitutional. Rather, it is the responsibility of this office to defend the constitutionality of statutes that are challenged in the courts.

Therefore, it is the position of this office, which it is prepared to defend in the courts, that the statute is valid and constitutional.

Sincerely,

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

March 6, 1981

OPINION LETTER NO. 97

Dr. Arthur L. Mallory
Commissioner
Department of Elementary and
Secondary Education
P. O. Box 480
Jefferson City, Missouri 65102

Dear Dr. Mallory:

In accordance with your request of February 27, 1981, we have reviewed the Missouri State Department of Elementary and Secondary Education's "application for Federal Assistance--Migrant Education Program" (fiscal year 1982). This application is being submitted under Title I of the Elementary and Secondary Education Act of 1965, P.L. 89-10, as amended. See 20 U.S.C. § 241c-2.

In addition to the Elementary and Secondary Education Act of 1965, as amended, and the regulations propounded pursuant thereto, our review has taken into consideration Art. III, § 38(a), Mo. Constitution (1945), and § 161.092, RSMo 1978.

Based on the foregoing, we hereby certify that the Missouri State Department of Elementary and Secondary Education has authority under state law to perform the duties and functions of a "state education agency" as defined in Title I of P.L. 89-10 (20 U.S.C. § 244), including those arising from the assurances set forth in the application.

This opinion letter constitutes our official certification and should be inserted in the appropriate place in each copy of the application.

Yours very truly,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

March 30, 1981

OPINION LETTER NO. 98
(Answer by Letter-Klaffenbach)

The Honorable Fred B. Brummel
Representative, 53rd District
Room 109D, Capitol Building
Jefferson City, Missouri 65101

FILED
98

Dear Mr. Brummel:

This letter is in response to your question asking:

May a municipal police officer use necessary force including forcible entry into a dwelling, to take a person into custody under a probate court order issued pursuant to section 632.305, RSMo Supp. 1980?

Subsection 2 of § 632.305, RSMo Supp. 1980, provides in pertinent part:

. . . If the court finds that there is probable cause, either upon testimony under oath or upon a review of affidavits, to believe that the respondent may be suffering from a mental disorder and presents a likelihood of serious physical harm to himself or others, it shall direct a peace officer to take the respondent into custody and transport him to a mental health facility for detention for evaluation and treatment for a period not to exceed ninety-six hours unless further detention and treatment is authorized pursuant to this chapter.
. . . .

Section 105.240, RSMo, provides:

Every officer may break open doors and enclosures to execute a warrant or other process for the arrest of any person, or

The Honorable Fred B. Brummel

to levy an execution, or execute an order for the delivery of personal property, if, upon public demand and an announcement of his official character, they be not opened.

Ballantine's Law Dictionary, 1948 Ed., p. 94, states that the word "apprehension" is applied exclusively to criminal cases, but the term "arrest" is applied to both criminal and civil cases. There appears to be no doubt that historically the term "arrest" in its general sense is used to apply to both criminal and civil cases. 5 Am. Jur. 2d, Arrest, § 3, p. 698; § 52, p. 743.

It seems clear that the provisions of § 105.240 do not relate solely to criminal matters. It is therefore our view that the term "arrest" as used in that section is used in the sense of both criminal and civil arrests, and therefore orders of the court pursuant to § 632.305(2) constitute "other process for the arrest of" the person sought to be detained.

Further, there appears to be no doubt that a municipal police officer is a "peace officer" within the provisions of § 632.305.

We therefore conclude that a municipal police officer is a peace officer authorized to take an individual into custody under a court order issued pursuant to subsection 2 of § 632.-305, and if necessary, to break open doors and enclosures to execute such process under the provisions and conditions of § 105.240.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, flowing script.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

March 17, 1981

OPINION LETTER NO. 99
(Answer by Letter-Klaffenbach)

The Honorable Travis Morrison
Representative, 152nd District
Route 1
West Plains, Missouri 65775



Dear Mr. Morrison:

This letter is in response to your question asking:

Under section 233.195, RSMo 1978, county courts must place to the credit of road districts four-fifths of that portion of the tax arising from and collected and paid upon any property within such road district. No mention is made of what must be done with the remaining one-fifth. May a county legally give each such road district this remaining one-fifth?

We understand that your question concerns a third class county not under township form of government.

Section 233.195, RSMo, provides in pertinent part:

1. County courts shall cause to be set aside and placed to the credit of each road district so incorporated four-fifths of such part or portion of the tax arising from and collected and paid upon any property lying and being within any such district, by authority of section 137.555, RSMo. All revenue so set aside and placed to the credit of any such incorporated district shall be used by the commissioners thereof for constructing, repairing and maintaining bridges and culverts within the district, and working, repairing, maintaining and dragging public roads within the district and paying legitimate administrative expenses of the district, and for such other purposes as may be authorized by law.

The Honorable Travis Morrison

Section 137.555, RSMo, which is referred to in § 233.195, provides:

In addition to other levies authorized by law, the county court in counties not adopting an alternative form of government and the proper administrative body in counties adopting an alternative form of government, in their discretion may levy an additional tax, not exceeding thirty-five cents on each one hundred dollars assessed valuation, all of such tax to be collected and turned into the county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose whatever; provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any special road district shall be paid into the county treasury and four-fifths of such part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose and shall be paid out to such special road district upon warrants of the county court, in favor of the commissioners or treasurer of the district as the case may be; provided further, that the part of said special road and bridge tax arising from and paid upon property not situated in any special road district and the one-fifth part retained in the county treasury may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village.

As can be seen from our quotation of the provisions of § 137.555, such funds are to be paid into The Special Road and Bridge Fund to be used for road and bridge purposes and for no other purposes whatever, except that the four-fifths, as provided, is paid to the special road district and except that the

The Honorable Travis Morrison

part of said special road and bridge tax arising from and paid upon the property not situated in any special road district and the one-fifth part retained in the county treasury may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county if said street shall form a part of a continuous highway of said county leading through such city or village.

In our Opinion No. 36, dated January 18, 1968, to Parish, copy enclosed, this office concluded that a county court of a third class county may expend the one-fifth portion of its \$ 137.555 monies on roads in a special road district but not on bridges in a special road district. Although the question of whether the county court may give the special road district the one-fifth portion was asked in that opinion, such question was not answered.

Since the legislature has provided for the exact use of these funds and has not authorized the county court to give such special road district the remaining one-fifth portion of said tax, we conclude that the county court has no authority to give such one-fifth portion to the special road district for use for either roads or bridges.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Enclosure
Att'y Gen. Op. No. 36,
Parish, 1/18/68

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

March 24, 1981

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

OPINION LETTER NO. 102
(Answer by ~~Letter-Klaffenbach~~)

FILED

102

The Honorable Steve Vossmeier
Representative, District 86
393 North Euclid Avenue
St. Louis, Missouri 63108

Dear Mr. Vossmeier:

This letter is in response to your questions asking:

Whether a member of the Board of Aldermen in a fourth-class city violates Article VII, Section 6 (nepotism) of the Missouri Constitution by casting a vote on the nomination of a third person for the position of City Clerk when the Alderman's spouse is the acting City Clerk?

If the Alderman can vote and tie results, can the Mayor cast a tie breaking vote on the position of City Clerk?

If the Alderman cannot vote, can a simple majority of two of the remaining three Aldermen appoint a City Clerk or must all three remaining Aldermen vote in favor of the appointment?

You also state:

Mrs. A. has been the appointed City Clerk of a fourth-class city since 1975. In 1977, her husband, Mr. A. was elected to the Board of Aldermen. Thereafter, Mrs. A. continued to be unanimously reappointed each year as the City Clerk by the remaining three members of the Board of Aldermen with Mr. A. abstaining from the nomination, motions, discussion and vote.

The Honorable Steve Vossmeier

Then in 1980, Alderman B moved to nominate Mrs. A for another term as City Clerk and Mr. A, as in the past, withdrew immediately from any participation. However, this time, neither Alderman C nor D seconded the motion and it died.

Presently, Mrs. A continues as acting City Clerk pending the appointment of her successor or her own reappointment. Alderman C and D intend to move and second the nomination of E as the new City Clerk and the successor to Mrs. A. Alderman A then announced that he intended to exercise his vote on the appointment of E, since E was no relation to A. At this time, the City Attorney pointed out that if E was denied the appointment partially as the result of a negative vote by A, then A's negative vote will have the effect of continuing Mrs. A in her position as acting City Clerk by having prevented a successor from being appointed.

The Board of Aldermen then agreed to table the nomination of E until Alderman A's right to vote on the nomination was determined by a legal opinion.

Section 6 of Art. VII of the Mo. Constitution provides:

Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment.

It is our view that § 6 of Art. VII of the Mo. Constitution is not violated by the alderman voting on the question of the appointment of an unrelated person to fill the position of city clerk even though the failure to make such an appointment may mean that the acting city clerk will continue in that position.

The Honorable Steve Vossmeier

Your second question asks whether the mayor can cast a tie-breaking vote on the position of city clerk if the alderman in question can vote and a tie results.

Section 79.320, RSMo, provides that the board of aldermen shall elect a clerk for such board, to be known as "the city clerk" whose duties and term of office shall be fixed by ordinance.

Under § 79.120, RSMo, the mayor has a seat in and presides over the board of aldermen but does not have a vote on any question except in case of a tie and is disqualified from voting in cases where he is an interested party. It is our view that this section authorizes the mayor to vote in case of a tie on the vote concerning the question of the election of a city clerk.

In view of our answer to your first question, an answer to your third question is not required.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a stylized, flowing script.

JOHN ASHCROFT
Attorney General

HANCOCK AMENDMENT:

TAXATION (MERCHANTS & MANUFACTURERS):

The change by the St. Louis County Board of Equalization in the formula for calculation of the merchants' and manufacturers' tax does not constitute an increase in the levy of an existing tax or the imposition of a new tax and need not, therefore, be submitted for voter approval according to the Hancock Amendment.

May 13, 1981

OPINION NO. 104

Honorable Frank Bild
State Senator, District 15
Room 320A, State Capitol Building
Jefferson City, MO 65101



Dear Senator Bild:

You recently requested an opinion from this office as to whether the St. Louis County Board of Equalization has the authority to change the formula by which the merchants' and manufacturers' tax is calculated without the submission of such formula change to the voters of St. Louis County.

The Hancock Amendment was adopted by the electorate on November 4, 1980, and added §§ 16 through 24 to Article X of the Missouri Constitution. Art. X, § 22(a), concerns the imposition of increased tax burdens by a political subdivision and provides in pertinent part as follows:

Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, . . . when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law . . . when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon.

. . .

Information supplied to us through your request and by the St. Louis County Board of Equalization indicates that the rules regarding allowable depreciation in connection with the merchants' license tax under Chapter 150, RSMo 1978, have been changed since November 4, 1980, the adoption date of the Hancock Amendment. Primarily, the rule change abolishes a first year depreciation allowance previously available to merchants responsible for payment of

Honorable Frank Bild

the tax. The point upon which the resolution of your question turns, therefore, is whether or not this amendment to the assessment formula--without an increase in the rate of the current levy--constitutes the levying of a tax not authorized by law or an increase in the current levy of an existing tax by St. Louis County such that voter approval would be required.

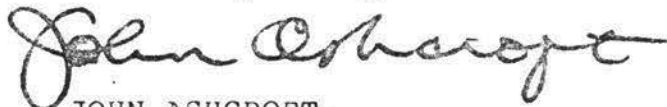
While we know of no prior Missouri decisions bearing on the precise point, we believe that the plain wording of Art. X, § 22(a) excludes this type of assessment procedure modification from the requirement of voter approval contained in that section.

CONCLUSION

It is the opinion of this office that the change by the St. Louis County Board of Equalization in the formula for calculation of the merchants' and manufacturers' tax does not constitute an increase in the levy of an existing tax or the imposition of a new tax and need not, therefore, be submitted for voter approval according to the Hancock Amendment.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Christopher M. Lambrecht.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, flowing script.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

65102

(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

May 14, 1981

OPINION LETTER NO. 106

The Honorable Gary E. Stevenson
Prosecuting Attorney
St. Francois County
Third Floor Courthouse
Farmington, Missouri 63640



Dear Mr. Stevenson:

You have requested our formal legal opinion on the question of whether a third class city may, consistent with §§ 590.100 - 590.175, RSMo 1978, employ auxiliary police officers to work approximately twenty hours per week when such officers have not been certified pursuant to the cited statutes.

These statutes, enacted in 1978, contain a requirement that "peace officers" be instructed "in a course of basic training for peace officers in a school, academy, or program approved and accredited by the director of [public safety] . . ." Section 590.115. The law contains its own definition of the term "peace officer."

'Peace officer', members of the state highway patrol, all state, county, and municipal law enforcement officers possessing the duty and power of arrest for violation of the general criminal laws of the state or for violation of ordinances of counties or municipalities of the state who regularly work more than thirty-two hours a week.

The Honorable Gary E. Stevenson

It seems evident that a person appointed or employed as a municipal police officer to serve approximately twenty hours each week is not a "peace officer" for purposes of the cited statutes and is, therefore, not required to be certified by the director of the Missouri Department of Public Safety.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

June 26, 1981

OPINION LETTER NO. 107
(Answered by letter--Turnbull)

The Honorable Kenneth L. Oswald
Prosecuting Attorney of Miller County
Miller County Courthouse Annex
Tuscumbia, Missouri 65082



Dear Mr. Oswald:

This letter is issued in response to your request for a ruling on the following two questions:

Does the following "official ballot": "Shall the County of Miller establish and maintain facilities, developmental programs, transportation, other related services, and continue existing programs for handicapped persons, and for which the County Court shall levy a tax not to exceed 10¢ per each \$100 assessed valuation?" comply with subsection 2 of § 205.972, RSMo 1978, which require the ballot to be substantially in the form therein set forth?

May the board of directors appointed pursuant to § 205.970 expend tax levy money to transport handicapped persons to a sheltered workshop in some other county where the initiating county has no sheltered workshop or facilities? Further, may funds be expended for transportation purposes within the county in view of the language of § 205.971?

As to your first question, the statutory requirements for the ballot form are set out in subsection 2 of § 205.972, RSMo 1978, as follows:

"2. The question shall be submitted in substantially the following form:

The Honorable Kenneth L. Oswald

Shall . . . (name of county or city not within a county) establish (and) (or) maintain a sheltered workshop and residence facility for handicapped persons, and for which the county or city shall levy a tax of . . . (insert exact amount to be voted upon) cents per each one hundred dollars assessed valuation therefor?"

The ballot contained in your question deviates from the statutory form in that while the statutory ballot specifies "a sheltered workshop and residence facility for handicapped persons", the ballot in your question substitutes "facilities, developmental programs, transportation, other related services, and continued existing programs for handicapped persons." Thus the question is whether this deviation would cause the ballot not to be in "substantially" the statutory form.

The Supreme Court has construed the word "substantially" in the context of use in a taxation statute as synonymous with "practically," "nearly," "almost," "essentially" and "virtually." St. Louis-Southwestern Railway Co. v. Cooper, 496 S.W.2d 836 (Mo. 1973).

Furthermore, in several cases involving the form of election ballots, the Supreme Court of Missouri has stated that where statutes provide that ballots be in a certain form without prescribing what results would follow if they were not used as required, the statutes would be considered directory rather than mandatory. The test would then be "whether or not the voters were afforded an opportunity to express and that they did fairly express their will." State ex rel. City of Memphis v. Hackman, 202 S.W. 7, 14 (Mo Banc 1918); Ginger v. Halferty, 193 S.W.2d 503, 505 (Mo. 1946); City of Raytown v. Kemp, 349 S.W.2d 363, 369 (Mo. banc 1961).

The permissible uses for the fund authorized to be levied, collected, and spent under § 205.971 consist of establishing or maintaining, or both, facilities providing sheltered workshops or places of residence and related services. These permissible uses may be more limited than the language on the ballot which could include more services than those expressly authorized.

Because the statute does not provide any penalty for not following the ballot, however, we believe that the test as to the legality of the ballot is expressed in the Memphis case, supra -- whether or not the voters were afforded an opportunity to express and that they did fairly express their will.

The Honorable Kenneth L. Oswald

We note that the election results were overwhelmingly in favor of the proposition on the ballot to support services for the handicapped. The vote was 1360 for and 932 against -- a 68% majority. In considering the ballot language, we believe the voters were neither deceived as to the types of persons who would benefit from the programs authorized to be supported nor were they deceived by the ballot language insofar as at least the programs authorized by the state statutes could be supported.

We conclude in this instance that although the language of the ballot may not be substantially in the same form required by the statute, the statute is directory rather than mandatory. Therefore, we believe that if a court were deciding this issue, it would hold that the 68% of the voters who voted on this issue were not deceived by the ballot language. Finally, insofar as the money is spent for the purposes set out in §§ 205.968 through 205.972, the tax may be levied, collected, and deposited in a special fund under section 205.971.

We point out that this office does not declare the law, Gershman Investment Corp. v. Danforth, 517 S.W.2d 33 (Mo. banc 1974); thus, we caution you that only a decision of a court in this respect would be final. Moreover, this office does not condone either deviation or variation from the requirements of forms suggested in the statutes such as the form specified in § 205.972, RSMo 1978, and we caution against including possibly extraneous matter in ballot language. See Buchanan v. Kirkpatrick, S.W.2d ____ (Mo. banc 1981) Supreme Court No. 62564 (April 3, 1981).

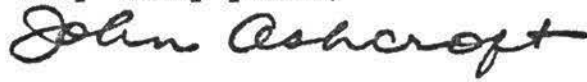
As to your second question § 205.968, RSMo, provides in part that "[t]he facility may operate at one or more locations in the county or city not with a county." In our view the quoted provision was only intended to authorize the location of such programs operated by the board in more than one location in the county. We do not believe that such language was intended to limit the authority of the board to contract with not-for-profit corporations because of their locations.

Subsection 3 of section 205.970 was added by S.B. 359 in 1977 to enable the counties to contract with not-for-profit corporations to provide certain services without limiting where the services were to be provided. We are therefore of the view that the board may contract with such a corporation in another county for such services.

The Honorable Kenneth L. Oswald

Furthermore, we are of the view that the board may spend money from the special fund for transportation of handicapped persons incidental to providing such services directly or through contract.

Very truly yours,

A handwritten signature in cursive script that reads "John Ashcroft". The signature is written in dark ink and is positioned below the typed name.

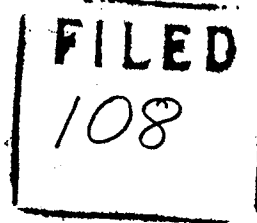
JOHN ASHCROFT
Attorney General

ASSESSMENTS: Interest collected on the assessment fund of
INTEREST: the county under § 137.720 and § 137.750, RSMo
COUNTIES: Supp. 1980, goes into such fund and is not to
be paid into county general revenue.

April 27, 1981

OPINION NO. 108

The Honorable Gary L. Busker
Prosecuting Attorney
Saline County
Second Floor, Courthouse
Marshall, Missouri 65340



Dear Mr. Busker:

This opinion is in response to your questions asking:

1) Whether a Second Class County is entitled to pay over interest it collected upon deposits of funds collected or withheld pursuant to Sections 137.720 and 137.750 RSMo to the County General Revenue Fund, or whether the interest must be deposited to the assessment and reassessment funds and paid to the taxing authorities from which the original funds were obtained.

2) Whether a Second Class County which collects interest upon deposits of funds collected pursuant to Sections 137.720 and 137.750 RSMo is entitled to use the interest for assessment or reassessment purposes if the original funds collected prove insufficient for the purpose.

Section 137.720, RSMo Supp. 1980, provides that a percentage of all ad valorem property tax collections allocable to each taxing authority within the county shall be deducted from the collections of taxes each year and shall be deposited into the assessment fund of the county as required under § 137.750, RSMo Supp. 1980. Such section further provides that the county shall bill any taxing authority collecting its own taxes.

The Honorable Gary L. Busker

Section 137.750, RSMo Supp. 1980, provides that the governing body of any county which seeks reimbursement pursuant to Chapter 137 shall establish a fund to be used exclusively for the purpose of funding the costs and expenses of the county or township assessors, and all funds so received shall be paid into the fund.

Section 52.360, RSMo, provides that the county collector in all counties of the first class not having a charter form of government and in all counties of the second class shall deposit each day in the depositories selected by the county for the deposit of county funds all monies received by him as county collector during the previous day and that interest will be paid into the general revenue fund of the county. However, we do not believe that such section is applicable here because it relates to county monies, and the funds established under § 137.720 and § 137.750 are special funds for assessment purposes.

It is our view that the holding of the court in State ex rel. Fort Zumwalt School District v. Dickherber, 576 S.W.2d 532 (Mo. Banc 1979), is applicable here. In that case the court stated the general principle that the interest on public funds designated for a specific purpose follows those funds in the absence of an unequivocal legislative expression otherwise. Therefore, it is our view that the interest from the funds collected under § 137.720 and § 137.750 follow the principal and go into the assessment fund and are not to be deposited in county general revenue.

It is further our view that such interest is to be used for the same purpose as the principal and not returned to the various taxing authorities, except that, pursuant to § 137.720 and § 137.750, any amount which is attributable to deductions or payments under such sections remaining in the fund each year after payment of all costs is to be paid to each taxing authority. We reach this conclusion because we believe that the funds collected pursuant to § 137.720 and § 137.750 lose their identities as funds of any particular taxing authority and are merged into one fund created for a particular statutory purpose.

CONCLUSION

It is the opinion of this office that interest collected on the assessment fund of the county under § 137.720 and § 137.750, RSMo Supp.

The Honorable Gary L. Busker

1980, goes into such fund and is not to be paid into county general revenue.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script that reads "John Ashcroft". The signature is written in dark ink and is positioned above the printed name.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

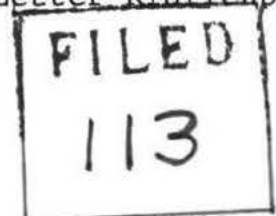
JEFFERSON CITY, MISSOURI 65102

(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

April 20, 1981

OPINION LETTER NO. 113
(Answer by Letter-Klaffenbach)



The Honorable Paul L. Bradshaw
Senator, 30th District
Senate Post Office
Jefferson City, Missouri 65101

This letter is in response to your question asking:

May the City of Springfield, Missouri, through the City Utilities of Springfield, Missouri, pay interest on loans made by commercial lenders when the loans are made to property-owning customers to pay for conservation measures to be applied to residential, industrial, and commercial property without violating Article VI § 25, Constitution of Missouri.

You have also enclosed a "Resolution of Intent" adopted by the Board of Public Utilities dated July 31, 1980, and a resolution of the City Council of the City of Springfield, Resolution No. 6680, passed August 25, 1980. The Council's resolution, which is based upon the Resolution of Intent adopted by the Board of Public Utilities provides essentially that the expenditure of funds by City Utilities of Springfield, Missouri, for energy conservation including payment of interest on loans for purposes consistent with "Missouri Residential Conservation Service Program, as developed by the Department of Natural Resources of the State of Missouri" is a public purpose. The resolution finds that the conservation of energy is of national, state and local concern, that such conservation may reduce the requirements for additional plant capacity thereby saving the customers of City Utilities money and making energy available to the customer at a lower cost, and approves such expenditures.

The City of Springfield is a constitutional charter city. As such, it possesses the following powers under § 19(a) of Article VI of the Missouri Constitution:

The Honorable Paul L. Bradshaw

Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law.

On the other hand, § 25 of Article VI of the Missouri Constitution provides:

No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation except as provided in Article VI, Section 23(a) and except that the general assembly may authorize any county, city or other political corporation or subdivision to provide for the retirement or pensioning of its officers and employees and the widows and children of deceased officers and employees and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services and to their beneficiaries or estates; and except, also, that any county of the first class is authorized to provide for the creation and establishment of death benefits, pension and retirement plans for all of its salaried employees, and the widows and minor children of such deceased employees.

We enclose our Opinion No. 60, dated January 30, 1981, to Cairns, in which we concluded that it is within the power of the general assembly to pass substantive legislation aiding crime victims and

The Honorable Paul L. Bradshaw

to appropriate money therefor from general revenue. While the cases cited in that opinion, Americans United v. Rogers, 538 S.W.2d 711 (Mo. Banc 1976), and State ex inf. Danforth, ex rel. Farmers' Elec. Coop, Inc. v. State Environmental Improvement Authority, 518 S.W.2d 68 (Mo. Banc 1975), both concerned state legislative action as opposed to council or local action, we believe that such cases are applicable here. Clearly, if § 25 of Article VI of the Missouri Constitution prohibits the city from taking such action, the city would have no such authority by virtue of its charter powers under § 19(a) of Article VI.

We are of the view, however, that the action of a local body such as the city council of a charter city possessing the powers given by § 19(a) of Article VI of the Missouri Constitution declaring public purpose would probably be upheld by the courts.

We caution you that a decision of a court in this respect is difficult to predict in light of the holding of Enright v. Kansas City, 536 S.W.2d 17 (Mo. Banc 1976). In that case an action was brought challenging a constitutional charter city's authority to grant city funds realized from city sales tax to school districts or portions of school districts lying within the city's corporate limits. The Supreme Court held that the city had authority to grant such funds to such school districts or such portions of school districts. The decision, however, was dissented to by three of the seven judges sitting on the court. Notably, even in that case, the majority of the court found that § 25 of Article VI was not applicable because the prohibition of that section relates to loans or grants to private corporations.

Therefore, although we conclude in this instance that such a finding by the city council of a bona fide public purpose for the expenditure of such funds would, in light of the cited cases, probably take the action of the council outside of the prohibition of § 25, Article VI, Missouri Constitution, we point out that this office does not declare the law, Gershman Investment Corp. v. Danforth, 517 S.W.2d 33 (Mo. Banc 1974). Therefore, it would appear prudent that the city obtain a court ruling before making such expenditures.

We do not purport to determine here whether the city charter has any application to this question.

The Honorable Paul L. Bradshaw

We are also of the view that the city council should provide in more detail, by ordinance or resolution, the precise action which the Board of Public Utilities may take to give effect to such declaration of public purpose in order to avoid any question of an improper delegation of authority to the Board.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Enclosure

Att'y Gen. Op. No. 60,
Cairns, 1/30/81

ASSESSMENTS:
REASSESSMENT:
HANCOCK AMENDMENT:
CONSTITUTIONAL LAW:
STATE TAX COMMISSION:

With regard to the statewide re-assessment currently in process the "state financed proportion" required to be maintained according to the Hancock Amendment (Art. X, § 21) is to be measured by the

percentages set forth in § 137.750, RSMo Supp. 1980, and that accordingly, the state is responsible for reimbursement to the counties based upon the application of those percentages to actual approved expenses incurred in each county of the state.

July 9, 1981

OPINION NO. 115

Honorable James Mathewson
State Senator, District 21
806 West Broadway
Sedalia, MO 65301



Dear Senator Mathewson:

You have recently requested an opinion of this office as to whether Art. X, § 21, Mo. Constitution (the Hancock Amendment), applies to the program support provisions contained in § 137.750, RSMo Supp. 1980, and if so, whether the "state financed proportion of the costs" for which the state is responsible is measured by the reimbursement rates provided for in that section or whether, on the other hand, that proportion is measured by the ratio of actual state reimbursements to actual total county costs during fiscal year 1981.

At the outset, we note that Art. X, § 21, Mo. Constitution, prohibits the state from "reducing the state financed proportion of the costs of any existing activity or service required of counties and other political subdivisions." While we know of no prior Missouri decisions directly on point, it is our considered opinion that the process of reassessment required of Missouri's counties by order of the State Tax Commission undoubtedly comprises an "activity or service" within the meaning of Art. X, § 21, Mo. Constitution. Accordingly, it becomes necessary to define the "proportion" which is required to be maintained by the Hancock Amendment.

Recent amendments to Chapter 137, RSMo, have substantially increased the number of assessment-related expense items for which a county may receive reimbursement from the state. Beginning with §§ 137.700 and 137.710, RSMo 1978, enacted in 1977, the General Assembly provided for state funding to defray 50% of certain specified salaries and expenses incurred by an assessor's office. In connection

Honorable James Mathewson

with the statewide general reassessment ordered by the State Tax Commission, the General Assembly in 1979 added § 137.750 to the existing guidelines on reimbursement. In pertinent part that section provides:

2. A county ordered to perform a general reassessment by the commission or a court shall be reimbursed for all reasonable costs expended pursuant to a general reassessment plan approved by the commission in the manner hereinafter set forth:

(1) Fifty percent from the state of all reasonable costs actually incurred pursuant to an approved plan including any costs otherwise reimbursed under sections 137.700 and 137.710;

(2) An additional twenty-five percent from the state for reasonable costs actually incurred pursuant to an approved plan which are incurred for the expenses specified in subdivision (4) of this subsection; in no event shall the total reimbursed from the state exceed seventy-five percent of actual cost, nor exceed thirty dollars per parcel;

While numerous activities required of counties and other political subdivisions have traditionally been at least partially funded from state revenues, we note that the provision set forth above is quite unusual in that it mandates the payment of a sum to each county, measured by a fixed percentage of that county's expenses. That provision suggests a resolution to the proportion issue, therefore, which is opposite to that which we believe obtains in the usual circumstance. That is, in the absence of a statute such as § 137.750.2 establishing an immutable ratio of state funds to total funds to be applied in each county, we conclude that § 21 would go no further than to require--with respect to any particular mandated service or activity--that the FY 1981 state portion of total program costs be preserved. Section 21 is, in other words, a "program-wide" funding requirement in most cases, such that while the actual ratio of state monies to local monies within a subdivision may vary, the amount of state funds when expressed as a percentage of total program expense will remain constant, based upon FY 1981 experience. We believe in this case, however, that § 137.750 clearly requires adherence to the specified percentages set forth therein and their application on a county-by-county basis.

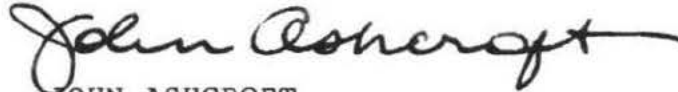
Honorable James Mathewson

CONCLUSION

It is, therefore, the opinion of this office that with regard to the statewide reassessment currently in process the "state financed proportion" required to be maintained according to the Hancock Amendment (Art. X, § 21) is to be measured by the percentages set forth in § 137.750, RSMo Supp. 1980, and that accordingly, the state is responsible for reimbursement to the counties based upon the application of those percentages to actual approved expenses incurred in each county of the state.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Christopher M. Lambrecht.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a stylized, sweeping flourish at the end.

JOHN ASHCROFT
Attorney General

May 1, 1981

OPINION LETTER NO. 116

The Honorable John G. Meyer
Prosecuting Attorney
Perry County
17 North Main Street
Perryville, Missouri 63775

FILED

116

Dear Mr. Meyer:

This is in answer to your recent opinion request relating to § 53.135, RSMo, concerning assessors' mileage.

We enclose a copy of Opinion Letter No. 221, dated November 23, 1976, to Raymond M. Weber.

We believe this opinion letter is self-explanatory and answers your question.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosure
Att'y Gen. Op. Ltr.
No. 221, Weber, 11/23/76

Attorney General of Missouri

JEFFERSON CITY

65102

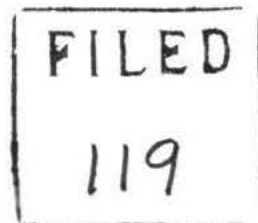
JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

May 4, 1981

OPINION LETTER NO. 119

Honorable David Doctorian
Senator 28th District
Room 431
Capitol Building
Jefferson City, MO 65101



Dear Senator Doctorian:

This letter is in answer to your request which reads as follows:

"Missouri Statute clearly identifies what a coronor must do if he is notified that a person died of violence or casualty (58.260). It does not identify exactly when a coroner should be asked to investigate a death."

Section 58.260, RSMo 1978, reads as follows:

"Every coroner, so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty, being found within his county, shall make out his warrant, directed to the sheriff of the county where the dead body is found, requiring him forthwith to summon a jury of six good and lawful citizens of the county, to appear before such coroner, at the time and place in his warrant expressed, and to inquire, upon a view of the body of the person there lying dead, how and by whom he came to his death."

The language of this statute is clear and unambiguous. As soon as a coroner is notified of a person supposed to have come

Honorable David Doctorian

to his death by violence or casualty, he is to begin his statutory duties. As indicated in Section 58.610, RSMo 1978, no jury is required, but the coroner still shall view the body and declare the cause of death when:

"[S]ome credible person shall have declared, under oath, to the coroner, that the person whose body is to be viewed came to his death by violence, or other criminal act of another..."

The meaning of the word "casualty" was explained in a prior opinion of this office, Opinion No. 77, to the Honorable L.D. Rice, March 8, 1933. A copy of that opinion is enclosed for your information. According to that opinion, which we feel is still correct today, "casualty" means, "a fatal or serious accident; disaster; accidental death or disablement; that which occurs by chance."

The word "violence" is defined as "force, 'physical force; force unlawfully exercised.'" Agee v. Employer's Liability Assurance Corporation, 213 Mo.App., 693, 698, 253 S.W. 46 (K.C. App., 1923).

We also enclose Op. No. 6 rendered November 26, 1951 to G.C. Beckham which is self-explanatory.

It is, therefore, our view that a coroner is required to investigate a death as soon as he is notified that a person was supposed to have come to his death by violence or casualty.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Enclosures

Att'y Gen. Op. No. 77,
Rice, 3/8/33

Att'y Gen. Op. No. 6
Beckham, 11/26/51

Attorney General of Missouri

JEFFERSON CITY

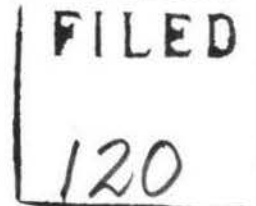
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JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

April 30, 1981

OPINION LETTER NO. 120
(Answer by Letter-Klaffenbach)



The Honorable Joe Moseley
Prosecuting Attorney
Boone County Courthouse
Columbia, Missouri 65201

Dear Mr. Moseley:

This letter is in response to your questions asking:

Assuming that a couple married as of January 1, of a certain year, is subsequently divorced during the same year, which of the parties is liable for taxes assessed against personal property when the property at the time of assessment was owned either (1) jointly or (2) separately; and when the assessment was made either as to (1) one party or (2) both parties.

Section 137.075, RSMo 1978, provides:

Every person owning or holding real property or tangible personal property on the first day of January, including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year.

We believe that it is clear that this section means that the tax liability is based on the ownership of property on January 1. State ex rel. Hayes v. Snyder, 41 S.W. 216 (Mo. 1897).

The Honorable Joe Moseley

It is our view with respect to personal property assessments that where the dissolution of marriage or legal separation has occurred after the January 1 date and there is no order by a court of law which would affect the assessment of property on that date, and where the assessment list returned shows both persons to be owners of the property, both such persons are jointly and severally responsible for the payment of such personal property taxes. We believe that the same is true where no assessment list is returned to the assessor and, therefore, personal property taxes are assessed by the assessor against the parties he believes to be the owners of the property on January 1. Clearly, the liability for the payment of such taxes is not dependent upon the continued ownership of the property but on ownership on the assessment date. Collector of Revenue v. Ford Motor Co., 158 F.2d 354 (8th Cir. 1946).

We believe that it also follows that where only one person is shown by the assessment list to be the owner of the property that such person alone is responsible for the payment of the taxes.

Section 301.025, RSMo, provides that where no such taxes are due, the collector shall, upon request, certify such fact and transmit such statement to the person making the request. Such a statement can only be given to a person who did not either jointly or separately own personal property on January 1 of the tax year, as shown by the assessment list, unless the tax on such property has already been paid.

Finally, we enclose our Opinion No. 5 dated July 31, 1953, to Barrick, which concludes that unassessed personal property may not be added to the tax books after the tax books have been placed in the hands of the collector, by the assessor, collector or county court. See St. ex rel. Hamilton v. Brown, 72 S.W. 640 (Mo. 1903). It appears therefore that the assessment lists would have to be considered conclusive with respect to the question of liability for such taxes in the absence of an order by a court of law to the contrary.

Very truly yours,

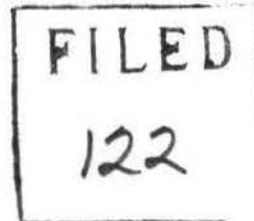


JOHN ASHCROFT
Attorney General

Enc: Atty. Gen. Op. No. 5,
Barrick, 7/31/53

April 22, 1981

OPINION LETTER NO. 122
(Answer by Letter-Klaffenbach)



The Honorable Larry E. Mead
State Representative, 3rd District
Room 230, State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Mead:

This letter is in response to your questions asking:

1. Does the term "executive meeting" in the Missouri Constitution mean the same as the term "closed meeting" in the present open meetings law?
2. Does the open meetings law, which was enacted some 30 years after the adoption of the latest Missouri Constitution, supersede the provisions of Article 3, Section 2 of the Missouri Constitution?
3. May the redistricting commission hold a closed meeting for any purpose other than those set forth in the present open meetings law, and does that law place limits on the topics which may be discussed at those meetings, if the commission is allowed to call such meetings under Article 3, Section 2?
4. Legislative committees with the responsibility of redrawing legislative districts would seem to be under the state's open meetings law, as are other legislative committees. Are these committees different from the commission appointed to redraw legislative districts for House members, and if so, why?

The Honorable Larry E. Mead

Section 2 of Art. III of the Missouri Constitution provides in pertinent part:

The commissioners so selected shall on the fifteenth day, excluding Sundays and holidays, after all members have been selected, meet in the capitol building and proceed to organize by electing from their number a chairman, vice chairman and secretary and shall adopt an agenda establishing at least three hearing dates on which hearings open to the public shall be held. A copy of the agenda shall be filed with the clerk of the house of representatives within twenty-four hours after its adoption. Executive meetings may be scheduled and held as often as the commission deems advisable.

* * *

Not later than five months after the appointment of the commission, the commission shall file with the secretary of state a tentative plan of apportionment and map of the proposed districts and during the ensuing fifteen days shall hold such public hearings as may be necessary to hear objections or testimony of interested persons. (Emphasis added.)

It is clear at the outset that the open meetings law, Chapter 610 RSMo, would not apply here if the constitution allowed the commission to hold closed meetings. This is because the constitution is the fundamental law and also because it is clear that § 610.025, RSMo, authorizes closed meetings as may be otherwise provided by law. The essential question then is whether the constitution authorizes closed meetings.

It is our view that the provision which we have quoted which authorizes "executive meetings" must be interpreted in its ordinary and plain sense. Section 1.090, RSMo. Since the language "executive meeting" ordinarily has the same meaning as "closed meeting" it is our view that such constitutional provision authorizes closed meetings to be scheduled by the commission and held as often as the commission deems advisable. However, the provisions we have quoted from Section 2 of Article III, also require an agenda establishing at least three hearing dates on which hearings open to the public shall be held and require such public hearings as may be necessary to hear objections or testimony of interested persons after the tentative plan of apportionment is filed with the secretary of state.

The Honorable Larry E. Mead

Therefore, while the commission may hold executive or closed meetings as often as it deems advisable, it must establish at least three hearing dates on its agenda for open meetings as well as such public hearings as are necessary to hear objections or testimony of interested persons after the tentative plan is filed.

Further, it is our view that there is no restriction on the topics which may be discussed in the executive meetings.

Very truly yours,

A handwritten signature in cursive script that reads "John Ashcroft". The signature is written in dark ink and is positioned centrally below the closing phrase.

JOHN ASHCROFT
Attorney General

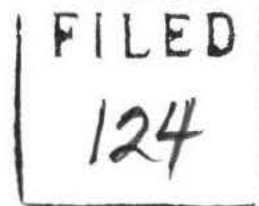
HANCOCK AMENDMENT:
CONSTITUTIONAL LAW:

The charges imposed by the Board of Public Works of the city of Fulton for electricity and natural gas consumption do not constitute any type of tax, license, or fee within the meaning of Art. X, § 22, Mo. Constitution, and that increases in those charges do not, therefore, depend for their validity upon voter approval prior to imposition.

See Pace v. City of Hannibal May 1, 1981
680 SW^{2d} 944 (1984)
and, *Ops No. 122-1982*
76-85

OPINION NO. 124

Honorable Joe Holt
Representative, District 109
Room 305A, State Capitol Building
Jefferson City, MO 65101



Dear Representative Holt:

You have requested an opinion from this office as to whether the Hancock Amendment would require the city of Fulton, which operates a municipally-owned utility through its Board of Public Works, to seek voter approval prior to increasing charges imposed upon its customers.

The Hancock Amendment adopted by the electorate on November 4, 1980, added §§ 16 through 24 to Art. X of the Missouri Constitution. Art. X, § 22(a), now provides in pertinent part as follows:

Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon.

...

It is clear that the city of Fulton may not increase the levy of an existing tax, license, or fee beyond the level currently authorized nor impose a new tax, license, or fee without voter approval. The dispositive issue to be determined, therefore, is whether the charge imposed by the city of Fulton through the Board of Public Works constitutes a tax, license, or fee subject to the proscription contained in § 22(a).

Honorable Joe Holt

As defined by Missouri courts, taxes consist of proportional contributions imposed upon persons or property for the support of government and for all public needs. See, for example, Leggett v. Missouri State Life Insurance Company, 342 S.W.2d 833 (Mo. Banc 1960); City of St. Louis v. Laclede Power & Light Co., 347 Mo. 1066, 152 S.W.2d 23 (1941); Taylor v. Gehner, 329 Mo. 511, 45 S.W.2d 59 (Banc 1932).

A license, secondly, refers to a means of regulating and taxing privileges and occupations. A license is, therefore, a permit to do that which would otherwise be unlawful. Commonly, a license may be obtained only upon payment of a sum by the licensee to the licensing entity. That sum may constitute a tax, if the fundamental purpose of the burden is to raise revenue, or a license fee, if it is primarily designed to contribute to the regulation of an occupation or privilege deemed in need of control for the benefit of the public. 53 C.J.S. Licenses § 3.

Fees, lastly, generally encompass payment for official services performed--in this case by officials of the counties or other local subdivisions. See, State ex rel. O'Connor v. Riedel, 329 Mo. 616, 46 S.W.2d 131 (Banc 1932) and cases there cited. State v. Dishman, 334 Mo. 874, 68 S.W.2d 797 (1934).

In addition to taxes, licenses, and fees, however, we note that statutes in force on the date of adoption of Art. X, § 22, authorized various "charges" to be collected by counties and other political subdivisions. See, for example, §§ 260.215 and 249.645, RSMo 1978. Properly termed "user charges" or "service charges," as they are often called, are imposed only to defray the expense incurred in providing a service or in making an activity available to those upon whom the charge is imposed. Craig v. City of Macon, 543 S.W.2d 772 (Mo. Banc 1976); City of Maryville v. Cushman, 363 Mo. 87, 249 S.W.2d 347 (Banc 1952). A charge differs from a tax, license, and fee in that: (1) it is not designed to produce revenue over that required to maintain service, (2) it does not relate to the regulation of an occupation or privilege, and (3) it is not imposed in connection with the performance of any official duties. See also, City of New Orleans v. Hop Lee, 29 So. 214 (La. 1901).

It should additionally be mentioned that Fulton's Board of Public Works is proposing an increase in user charges which directly reflects the increased cost of energy which must be purchased by the utility from outside sources to supply its own customers.

Because the constitutional restriction in question extends specifically only to taxes, licenses, and fees, it is not--according to the general rules of statutory construction--applicable to those burdens imposed which do not fall within the specific

Honorable Joe Holt

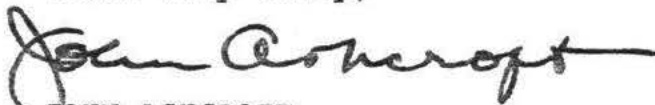
listing. Accordingly, we believe that Art. X, § 22, does not require voter approval for a political subdivision to increase or impose a user charge or service charge, the purpose of which is merely to defray the cost of providing the service for which the charge is made, rather than to provide additional revenue for the general support of the local subdivision.

CONCLUSION

It is the opinion of this office that the charges imposed by the Board of Public Works of the city of Fulton for electricity and natural gas consumption do not constitute any type of tax, license, or fee within the meaning of Art. X, § 22, Mo. Constitution, and that increases in those charges do not, therefore, depend for their validity upon voter approval prior to imposition.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Christopher M. Lambrecht.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, sweeping flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

65102

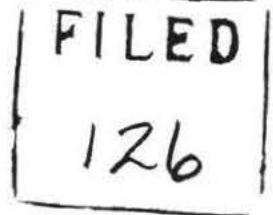
(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

May 7, 1981

OPINION LETTER NO. 126
(Answer by Letter-Klaffenbach)

The Honorable James F. Antonio
State Auditor
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Antonio:

This letter is in response to your question asking to what fund the interest earned on the county special road and bridge fund should be credited.

You point out that subsection 2 of § 110.150, RSMo, provides as follows:

The interest upon each fund shall be computed upon the daily balances with the depository, and shall be payable to the county treasurer monthly, who shall place the interest on the school funds to the credit of those funds respectively, the interest on all county hospital funds and hospital district funds to the credit of those funds, the interest on county health center funds to the credit of those funds and the interest on all other funds to the credit of the county general fund.

Section 12(a) of Article X of the Missouri Constitution provides that the county special road and bridge fund is to be used for road and bridge purposes. Likewise, §§ 137.555 and 137.585, RSMo, limit the use of special road and bridge funds to road and bridge purposes.

The Honorable James F. Antonio

You have a copy of our Opinion No. 171, 1980, in which we concluded that interest earned by a county on money which the county receives from the County Aid Road Trust Fund should be credited to the county road and bridge fund and not to the county general revenue fund. We believe that the reasoning of this opinion is applicable to the question you now ask and therefore we conclude that interest earned on the county special road and bridge fund should be credited to the special road and bridge fund and not to the county general fund.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a stylized flourish at the end.

JOHN ASHCROFT
Attorney General

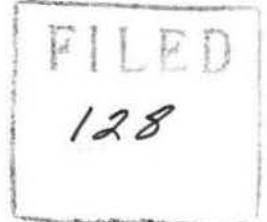
LAND RECLAMATION COMMISSION:
STATE CONTRACTS:
STATE PURCHASES:

The Land Reclamation Commission in implementing the Surface Coal Mining Law, Sections 444.800 to 444.940, RSMo Supp. 1981, is subject to requirements of the Purchasing Law, Chapter 34, RSMo 1978.

December 31, 1981

OPINION NO. 128
(corrected)

Mr. Stephen C. Bradford
Commissioner of Administration
Office of Administration
P. O. Box 809
Jefferson City, Missouri 65102



Dear Mr. Bradford:

This is in response to your request for an opinion as follows:

Can the Land Reclamation Commission pursuant to Section 444.810, subsection (9) Cum. Supp. RSMo 1980 [sic] wherein it is authorized to "contract for such professional and technical services as necessary" in implementing the Surface Coal Mining Law, bid, award contracts, and contract for such professional and technical services without being subject to Chapter 34, RSMo 1978?

Chapter 34, RSMo 1978, contains the Missouri purchasing law. Section 34.030, RSMo 1978, sets out the types of purchases which must be competitively bid under Chapter 34:

The commissioner of administration shall purchase all supplies for all departments of the state, except as in this chapter otherwise provided. The commissioner of administration shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the constitution of the state. (Emphasis added.)

Mr. Stephen C. Bradford

Section 34.010 provides the following definitions:

1. "Contractual services" shall include all telephone, telegraph, postal, electric light and power service, and water, towel and soap service.
2. The term "department" as used in this chapter shall be deemed to mean department, office, board, commission, bureau, institution, or any other agency of the state, except the legislative and judicial departments.
3. The term "purchase" as used in this chapter shall include the rental or leasing of any equipment, articles or things.
4. The term "supplies" used in this chapter shall be deemed to mean supplies, materials, equipment, contractual services and any and all articles or things, except as in this chapter otherwise provided.

It is clear that the Land Reclamation Commission falls within the above definition of "department." It is also clear that professional and technical services are contractual services which fall within the statutory definition of "supplies."

In rendering this opinion, we are aware of Section 444.810, RSMo Supp. 1981, which provides as follows;

The commission may:

* * *

(9) Retain, employ, provide for, and compensate, within the limits of appropriations made for that purpose, such consultants, . . . as may be necessary to carry out the provisions of [the Surface Coal Mining Law] . . . ; and when appropriate, contract for such professional and technical services as necessary; . . .

Previously, in our Opinion Letter No. 22, Muckler, July 24, 1980, we concluded that:

professions and services other than those of physicians, attorneys and such expert witnesses are subject to the requirements of the purchasing law.

Mr. Stephen C. Bradford

We further note that Section 34.030, RSMo 1978, provides:

The commissioner of administration shall purchase all supplies for all departments of the state, except as in this chapter otherwise provided. . . . (Emphasis added.)

As there has been no amendment to Chapter 34 which would excuse the Land Reclamation Commission from its requirements, we believe that Opinion Letter No. 22, Muckler, supra, remains a correct interpretation of the law of Missouri. It is, therefore, our opinion that Chapter 34 is a clear, unambiguous, legislative mandate that the purchasing of supplies for state departments be made by the commissioner of administration.

Section 444.810.9 notwithstanding, we believe that the Land Reclamation Commission must purchase its supplies, which include professional and technical services, under the provisions of Chapter 34. However, this conclusion does not require the commissioner of administration to purchase professional and technical services for the Land Reclamation Commission. Section 34.100, RSMo 1978, allows the commissioner of administration to delegate the purchasing of supplies of a technical nature to the department:

The commissioner of administration shall have power to authorize any department to purchase direct any supplies of a technical nature which in his judgment can best be purchased direct by such department. He shall also have power to authorize emergency purchases direct by any department. He shall prescribe rules under which such direct purchases shall be made. All such direct purchases shall be reported immediately to the commissioner of administration together with all bids received and prices paid. (Emphasis added.)

We believe that the phrase "supplies of a technical nature" includes professional services required by the Land Reclamation Commission to carry out its duties under the Surface Coal Mining Law.

Since your question contemplates a bidding procedure by the Land Reclamation Commission prior to an award for a contract for professional and technical services, an authorization by the commissioner of administration to the Land Reclamation Commission under Section 34.100 to purchase professional and technical services directly will maintain the integrity of Chapter 34 and allow the Land Reclamation Commission the flexibility it needs to carry out its mission effectively.

Mr. Stephen C. Bradford

CONCLUSION

It is, therefore, the opinion of this office that the Land Reclamation Commission, in implementing the Surface Coal Mining Law, Sections 444.800 to 444.940, RSMo Supp. 1981, is subject to requirements of the Purchasing Law, Chapter 34, RSMo 1978.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft". The signature is written in dark ink and is positioned above the printed name and title.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

September 25, 1981

OPINION LETTER NO. 129

The Honorable Stephen C. Bradford
Commissioner of Administration
P. O. Box 809
Jefferson City, Missouri 65102



Dear Commissioner Bradford:

This letter is in response to your questions asking:

1. Must the Office of Administration, pursuant to Section 207.025, RSMo 1978, make reimbursements to counties for the additional compensation of Prosecuting Attorneys once per year only rather than monthly?
2. If the answer to the above question is in the affirmative, then is the annual period referred to in the statute to be the state's fiscal year commencing July 1 and ending June 30?
3. If the answer to the above question is in the negative, then what is the beginning and ending date of the annual periods?
4. Can funds erroneously reimbursed by the Office of Administration be subtracted from future reimbursements to counties?
5. If the answer is affirmative, is there a limit as to how many years in arrears the Office of Administration may utilize to calculate erroneous payments?

The Honorable Stephen C. Bradford

Subsection 8 of § 207.025, RSMo provides:

For the performance of the additional duties imposed by this section, each prosecuting attorney in counties of the third and fourth class shall receive additional annual compensation of four thousand five hundred dollars; each prosecuting attorney in counties of the second class shall receive additional annual compensation of two thousand dollars; each prosecuting attorney in counties of the first class without a charter form of government shall receive additional annual compensation of one thousand dollars; each circuit attorney in cities not contained within a county shall receive additional annual compensation of seven thousand five hundred dollars. The additional annual compensation for prosecuting attorneys and circuit attorneys provided for in this section shall be paid with county funds or city funds; provided, however, that the state shall reimburse the counties or cities for funds expended for the additional annual compensation to the extent that incentive payments made to a county or city by the division of family services pursuant to the terms of cooperative agreements are insufficient to pay for the additional annual compensation. The governing body in each county or city shall submit a monthly billing to the office of administration listing the amount of incentive payment moneys received and listing the amount of money owing to the county or city as reimbursement for the additional annual compensation for the prosecuting attorney or circuit attorney. The office of administration shall pay such sum monthly from the amount of money appropriated specifically for such purpose by the general assembly. In the absence of a cooperative agreement between the county or city and the division of family services, the additional annual compensation provided for in this section shall be paid with county or city funds entirely and not with state funds.

It seems clear that the governing body in each county that has a cooperative agreement with the division of family services is required to submit a monthly billing to

The Honorable Stephen C. Bradford

the Office of Administration listing the amount of incentive payment monies received and listing the amount of money owing to the county as reimbursement for the additional annual compensation for the prosecuting attorney to be paid by the Office of Administration monthly from the amount of money appropriated for that purpose.

It is our view that the Office of Administration is required to pay what is owing to the counties on a monthly basis but that in determining the amount which is due, the incentive payments which have been made to the counties should be considered on a continuing, cumulative basis.

In answer to your fourth question, we believe that funds erroneously reimbursed to the counties by the Office of Administration should be offset against future reimbursements to the counties if the counties do not make payments to the state to adjust the accounts.

In answer to your fifth question, we view the accounts as being current accounts within the purview of § 516.160, RSMo, which provides that in an action brought to recover a balance due on a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item in the account on the adverse side. It is, however, arguable in the absence of demands by the state that § 516.120(2), RSMo, which relates to a five year period of limitations on actions created by statute other than a penalty or forfeiture, might apply. See State ex rel. Robb v. Poelker, 515 S.W.2d 577, 580 (Mo. banc 1974). Therefore, it would seem appropriate that demand be made upon counties which have been overpaid for the amount of the overpayments in accordance with the view we have stated herein, and action be expeditiously taken to adjust the overpayments, such adjustment including all overpayments made since such provisions of § 207.025, first became effective, July 1, 1977.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

July 1, 1981

OPINION LETTER NO. 130

The Honorable Estil Fretwell
Representative, 1st District
Route #2
Canton, Missouri 63435



Dear Representative Fretwell:

This letter is in response to your question which asks:

- (1) Does section 167.131, RSMo, apply to elementary students in grades kindergarten through grade eight?
- (2) Is an unclassified school district responsible for paying the tuition of a resident elementary student who attends an adjoining classified school district but who was not assigned to such adjoining school district by the commissioner of education, or his designee under the provisions of section 167.121, RSMo?

Paragraph 1 of § 167.131, RSMo 1978, states as follows:

The board of education of each district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each pupil resident therein who has completed the work of the highest grade offered in the schools of the district and who attends an approved high school in another district of the same or an adjoining county, or an approved high school maintained in connection with one of the state institutions of higher learning, where work of one or more higher grades is offered.

The Honorable Estil Fretwell

The primary rule of statutory construction requires us to ascertain the intent of the legislature from the language used and to consider words in their plain and ordinary meaning. State v. Kraus, 530 S.W.2d 684 (Mo. banc 1975), and State ex rel. Dravo Corp v. Spradling, 518 S.W.2d 512 (Mo. 1974). It is apparent that the legislature intended the statute to apply only to high school students residing in a school district that does not maintain an approved high school. No similar reference is made in § 167.131 concerning elementary age students.

With respect to the second question you asked, we can find no statutory provision requiring an unclassified school district to be responsible for paying the tuition of a resident elementary student who attends an adjoining classified school district. Therefore, an unclassified school district is not responsible for paying the tuition of a resident elementary student who attends an adjoining classified school district either under § 167.131 or any other statutory provision, except if such child was assigned pursuant to the provisions of § 167.121, RSMo.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a stylized flourish at the end.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

December 24, 1981

OPINION LETTER NO. 132

The Honorable Lester R. Patterson
Representative, District 44
Capitol Building, Room 107E
Jefferson City, Missouri 65101



Dear Representative Patterson:

You have requested our legal opinion on the following questions:

1. Does a statutory lien for towing service arise when a company performs wrecker services upon order of a police department of a third class city police department [sic] following an accident?
2. Can the wrecker service also acquire a statutory lien for storage of the vehicle?

In explanation of your questions, you state:

A third class city in my district has a contract with a towing service. Following an accident when a vehicle is inoperable and the owner or operator is injured or does not summon a private wrecker of his own choice the police department contracts a private contractor to clear the roadway. Does the wrecker-towing service acquire a statutory lien against the vehicle under Section 430.020, RSMo 1978, or some other applicable portion of Missouri law?

The Honorable Lester R. Patterson

The statute to which you refer provides:

Every person who shall keep or store any vehicle, part or equipment thereof, shall, for the amount due therefor, have a lien; and every person who furnishes labor or material on any vehicle, part or equipment thereof, who shall obtain a written memorandum of the work or material furnished, or to be furnished, signed by the owner of such vehicle, part or equipment thereof, shall have a lien for the amount of such work or material as is ordered or stated in such written memorandum. Such liens shall be on such vehicle, part or equipment thereof, as shall be kept or stored, or be placed in the possession of the person furnishing the labor or material.

We read the first sentence of this statute as containing two independent clauses, separated by the semicolon*, with the first clause pertaining to the service of storage and the second clause pertaining to the service of repair. The statute does not in our opinion relate to the service of towing a vehicle.

We believe the first clause gives to a person who keeps or stores a motor vehicle a lien for those services that is not dependent upon the owners's prior consent. In this respect, it is in plain contrast to the second clause which clearly requires the owner of the vehicle to authorize in writing the service of repair either before or after it is rendered.

We are therefore of the opinion that if a police officer at the scene of a motor vehicle accident, in default of the owner doing so, summons a wrecker to remove an inoperable vehicle from a public street or highway, the person or company providing the service of towing and storage would be entitled under § 430.020 to a lien on the vehicle to secure the payment of a reasonable charge for storing but not for towing the vehicle.

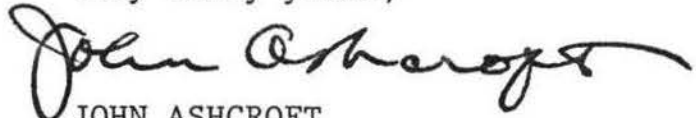
*The presence of a semicolon following the first "lien" is significant. In accepted usage the semicolon is employed as follows: "If two or more clauses grammatically complete and not joined by a conjunction are to form a single compound sentence, the proper mark of punctuation is a semicolon. . . . It is, of course, equally correct to write each of these as two sentences, replacing the semicolon with periods. . . ." The Elements of Style, William Strunk, Jr., 3rd Ed., pp. 5-6 (MacMillan Pub. Co., 1979).

The Honorable Lester R. Patterson

The courts have ruled that § 430.020 does not displace the common law artisan's lien, e.g., Bostic v. Workman, 31 S.W.2d 218 (Mo.App., Spr. 1930); but since you have expressed interest only in statutory liens we will not further discuss or consider common law liens.

Although it applies only to members of the state highway patrol and county sheriffs, we observe that § 304.155 provides that such officers may authorize a service station or garage operator to remove from highway right-of-ways any motor vehicle left unattended for more than 48 hours and entitles the service station or garage to retain possession of the vehicle until paid reasonable towing and storage charges by the owner of the vehicle or the holder of a valid security interest thereon which is in default.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", written in a cursive style.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

65102

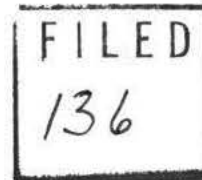
JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

June 22, 1981

OPINION LETTER NO. 136
(Answered by letter--Klaffenbach)

The Honorable Larry E. Mead
State Representative 111th District
Room 203, State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Mead:

This letter is in response to your question asking as follows:

Opinion Number 65, issued in 1981, stated that an alderman of a fourth class city who abstains from voting, under Section 79.130, RSMo, does not have his abstention counted as a vote. Does this opinion apply to school boards?

We assume that the section to which you refer is § 162.301, RSMo Supp. 1980, with respect to six director school districts. Subsection 3 of that section provides:

A majority of the board constitutes a quorum for the transaction of business, but no contract shall be let, teacher employed, bill approved or warrant ordered unless a majority of the whole board votes therefor. When there is an equal division of the whole board upon any question except the reemployment of a teacher, the presiding judge of the county court, if requested by at least three members of the board, shall cast the deciding vote upon the question, and for the determination of the question shall be considered a member of the board. (Emphasis added.)

The Honorable Larry E. Mead

We enclose a copy of our Opinion No. 65 - 1981, which quoted the pertinent part of the court's opinion in State ex rel. Stewart v. King, 562 S.W.2d 704 (Mo.App., K.C.D. 1978). It seems clear that because subsection 3 of § 162.301 requires that "a majority of the whole board vote[s] therefor" the Court of Appeals' decision is applicable to such vote of the board of directors of six director school districts. Therefore an abstention would not be counted as a vote under such subsection.

In light of the conclusion we reach, which we feel is required because of the holding in State ex rel. Stewart v. King, supra, we are withdrawing our Opinion No. 62, 7/24/42, Mitchell and Opinion No. 162, 10/13/77, Staples.

Finally, we believe you should be aware that, in our view, the 1978 opinion of the Missouri Court of Appeals in Kansas City conflicts with the holding of the same court in 1932 in Bonsack and Pearce, Inc. v. School District of Marceline, 49 S.W.2d 1085 (K.C. Mo.App. 1932). Therefore, in the absence of appropriate legislation, it is difficult to predict how a different court of appeals district, or the Missouri Supreme Court might rule.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enc: Att'y Gen. Op. No. 65
2/2/81, Strong

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

October 7, 1981

OPINION LETTER NO. 137



The Honorable Phil Snowden
Senator, District 17
Capitol Building
Jefferson City, Missouri 65101

Dear Senator Snowden:

You recently requested an opinion from this office as to whether the Hancock Amendment requires the Board of Trustees of North Kansas City Memorial Hospital to obtain voter approval before raising the fees and charges it makes to patients at the hospital.

You inform us that pursuant to §§ 96.150 through 96.228, RSMo, a special election was held in the City of North Kansas City, Missouri, on June 22, 1954, at which time the qualified voters of North Kansas City authorized that a tax be levied to establish and maintain a hospital in the City of North Kansas City. Further, in 1958, the North Kansas City Memorial Hospital commenced operation and has subsequently undergone significant expansion until today it houses 312 beds and provides a complete, regional medical facility for the area.

It is further our understanding that the Board of Trustees is appointed by the mayor of North Kansas City, subject to the approval of the city council of that city. The Board has reporting responsibilities to the city council and other duties more fully described in Chapter 96, RSMo.

The Honorable Phil Snowden

The portion of the Hancock Amendment which applies directly to your question is found in Art. X, § 22(a), Mo. Const., and provides in pertinent part as follows:

Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon. . . .

In our Opinion No. 124, Holt, 1981, we held that the language "existing tax, license or fees" as used in Art. X, § 22(a), did not apply to charges which were imposed to defray the expense incurred in providing a service or in making an activity available to those upon whom the charge was imposed. (A copy of said opinion is enclosed for your review.) We believe that the reasoning of Opinion No. 124 is applicable to the question which you have asked, and accordingly, it is our opinion that Art. X, § 22(a), does not require voter approval for the North Kansas City Memorial Hospital to increase the fees and charges it makes to its patients, provided the fees and charges are established merely to defray the costs of providing the service for the patient care offered by the hospital.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosure: Opinion No. 124 (1981)

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

September 28, 1981

OPINION LETTER NO. 139

The Honorable Jerry E. McBride
State Representative, 130th District
Room 414B, Capitol Building
Jefferson City, Missouri 65101



Dear Representative McBride:

This letter is in response to your questions asking:

1. In a third class city in Missouri when an election is held by the city council members to fill the position of mayor pro tem can the election be conducted by secret ballot of the council members when only the final tally is announced and not the specific vote of each council member?
2. In case of a tie, is it permissible under state law for the mayor then to vote to break the tie?

Section 77.070, RSMo 1978, provides in pertinent part:

[T]he council shall elect one of its members president pro tem, who shall hold his office for the term of one year, and who, in the absence of the mayor, shall preside at the meetings of the council; . . .

Section 77.250, RSMo 1978, provides in pertinent part:

The mayor shall be president of the council and shall preside over same, but shall not vote except in case of a tie in said council, when he shall cast the deciding vote; but provided, however, that he shall have no such power to vote in cases when he is an interested party.

The Honorable Jerry E. McBride

Section 610.015, RSMo 1978, which is part of the Sunshine Law provides:

Except as provided in section 610.025, and except as otherwise provided by law, all public votes shall be recorded, and if a roll call is taken, as to attribute each 'yea' and 'nay' vote, or abstinence if not voting, to the name of the individual member of the public governmental body, and all public meetings shall be open to the public and public votes and public records shall be open to the public for inspection and duplication. (Emphasis added.)

In answer to your first question, it is well established that the Sunshine Law is applicable to cities. State ex rel. Board of Public Utilities of the City of Springfield v. Crow, 592 S.W.2d 285, 288[2] (Mo.App., S.D. 1979). Because there is no exception provided in § 610.025, RSMo, or otherwise, an election by city council members to fill the position of president pro tem comes within the provisions of §§ 610.010, et seq., RSMo, and the meeting, vote and record must be open to the public.

There is no requirement in § 77.070 that the vote of each member be attributed to the member. Section 610.015 only requires a record of each member's vote if a roll call is taken. Therefore, it is arguable that, in such an election, secret ballots are not prohibited and only the final vote need be recorded and open to the public. It is our view, however, that the definition of "public vote", § 610.010(5) as "any vote cast at any public meeting of any public governmental body" requires the conclusion that secret ballots are not permitted at meetings which are required to be open under the Sunshine Law.

In answer to your second question, it seems clear from the provisions of § 77.250 that the mayor is the president of the council and has the right to vote in case of a tie, except in cases where he is an interested party. It is our view that the provisions of § 77.250 apply to elections for president pro tem under § 77.070.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

July 8, 1981

OPINION LETTER NO. 145
(Answered by letter--Wieler)

The Honorable John A. Birch
Representative, 17th District
10106 N.W. 72nd Street
Kansas City, Missouri 64152



Dear Mr. Birch:

This letter is in response to your opinion request asking whether a vehicle which was originally constructed for use as a school bus may be licensed as a vanpool under the provisions of Senate Substitute for House Bill No. 695, 81st General Assembly, signed into law by the Governor on May 28, 1981, to be effective on September 28, 1981.

House Bill No. 695 repeals § 301.010, RSMo Supp. 1980, and replaces it with identical language respecting vanpools, except that the limit on the number of employees in the vanpool is increased from fifteen under the current law to thirty under House Bill No. 695. It is the view of this office that a vehicle originally constructed as a school bus can be licensed as a vanpool under either § 301.010, RSMo Supp. 1980, or House Bill No. 695, depending upon which section is in effect as law at the time, provided of course that the vehicle otherwise qualifies as a vanpool under the provisions of the section in effect.

Subsection 35 of House Bill No. 695 defines a vanpool as:

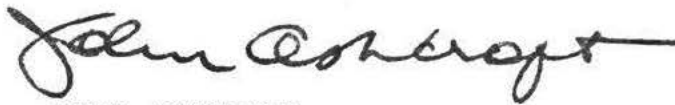
[A]ny van or other motor vehicle used or maintained by any person, group, firm, corporation, association, city, county or state agency, or any member thereof, for the transportation of not less than eight nor more than thirty employees, per motor vehicle, to and from their place of employment for no monetary profit;

The Honorable John A. Birch

Whether a vehicle qualifies as a vanpool is dependent on the use of the vehicle, and not its design. Therefore, under such quoted provisions which become effective September 28, 1981, to qualify as a vanpool, a vehicle must be used 1) for the transportation of not less than eight nor more than thirty employees; 2) to and from their place of employment; and 3) for no monetary profit. If these criteria are met, then the vehicle is eligible for registration as a vanpool. The vehicle qualifies even if it is capable of carrying more than thirty employees, provided that no more than thirty employees are actually carried at one time.

The vehicle qualifies under § 301.010, RSMo Supp. 1980, which is effective until September 28, 1981, even if it is capable of carrying more than fifteen employees, provided that no more than fifteen are carried at one time.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, flowing script.

JOHN ASHCROFT
Attorney General

ACCIDENT REPORTS:
JUVENILES:
PEACE OFFICERS AND PEACE OFFICERS' RECORDS:
TRAFFIC OFFENSES:
TRAFFIC VIOLATIONS:

Peace officers, upon request: (1) must release the names of juveniles involved in traffic accidents when such juveniles

are not alleged to have violated any state or municipal traffic ordinances or regulations in connection with such accidents; (2) must release the names of sixteen-year-old juveniles who are alleged to have violated non-felony state or municipal traffic ordinances or regulations in connection with a traffic accident; (3) may not release the names of juveniles who are alleged to have violated state or municipal traffic ordinances or regulations the violations of which are felonies; (4) may not release the names of juveniles under the age of sixteen who are alleged to have violated state or municipal traffic ordinances or regulations; and (5) consistent with this opinion's holding on the release of names, must release other pertinent information concerning a traffic accident to inquiring parties.

December 31, 1981

OPINION NO. 153
(Revised)

The Honorable Gary D. Sharpe
Representative, District 13
3305 Pershing Avenue
Hannibal, Missouri 63401



Dear Representative Sharpe:

This opinion is written in response to your request in which you ask the following questions:

Under current state law, can police release the names of juveniles of any age involved in an accident, either as a driver, passenger, or pedestrian (a) when a crime has been committed or (b) when a crime has not been committed?

If not, can they release other information concerning the accident and withhold the names?

A closed record is defined in Section 610.010(1), RSMo 1978, as "any . . . record . . . closed to the public." A public record is

The Honorable Gary D. Sharpe

defined in the same section as "any record retained by or of any public governmental body . . ." Section 610.010(4), RSMo 1978. Section 610.025, RSMo 1978, provides that records of juvenile court proceedings, as well as other records as otherwise provided by law, may be closed records.

The proceedings of the juvenile court as well as all information and social records prepared in the discharge of official duty for the court are open to inspection only by an order of the court. Section 211.321.1, RSMo Supp. 1981. Additionally, Section 211.321.2 provides:

2. Peace officers' records, if any are kept, of children shall be kept separate from the records of persons seventeen years of age or over and shall not be open to inspection or their contents disclosed, except by order of the court. This subsection does not apply to children who are transferred to courts of general jurisdiction as provided by section 211.071. (Emphasis added.)

In our Opinion No. 181, Limbaugh, October 27, 1980, we recognized that the intent of the legislature in enacting Chapter 211 was to protect only those children who come within the juvenile court's jurisdiction. In reaching that conclusion, we noted that Section 211.011, RSMo 1978, describes the purpose of the Juvenile Code as follows:

[T]o facilitate the care, protection and discipline of children who come within the jurisdiction of the juvenile court. This chapter shall be liberally construed, therefore, to the end that each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control, preferably in his own home, as will conduce to the child's welfare and the best interests of the state

. . . .

When read in light of the purpose of Chapter 211, we believe that Section 211.321.2 affects only those records of children who come within the jurisdiction of the juvenile court. The records to which Section 211.321.2 applies are "records . . . of children." Only records pertaining to a specific child are protected by the statute. Records which incidentally mention a child's name do not fall within the purview of Section 211.321.2.

In your request, you express concern over the availability of traffic accident reports. We believe that traffic accident reports are reports of incidents, not records of children. Accordingly, it

The Honorable Gary D. Sharpe

is our opinion that traffic accident reports are not protected by Section 211.321.2.

Such a conclusion is mandated by the legislature's treatment of accident reports. Section 303.040, RSMo Supp. 1981, requires that an accident report be made to the director of revenue under certain circumstances. All written accident reports must be forwarded to the superintendent of the Missouri Highway Patrol under Section 483.250, RSMo Supp. 1981, without mention of any requirement of a court order or any exception being provided if an individual involved in an accident happens to be a child within the meaning of Section 211.021(2), RSMo Supp. 1981.

Senate Bill No. 512, 80th General Assembly (Section 211.031, RSMo Supp. 1981), amended the Juvenile Code by, inter alia, removing from the juvenile court's jurisdiction children sixteen years of age who are alleged to have violated a state or municipal traffic ordinance or regulation, the violation of which does not constitute a felony. In interpreting the amended Section 211.031, our Opinion No. 181 (1980) concluded that, in light of this express limitation of the juvenile court's jurisdiction, the procedural protection accorded juveniles under the Juvenile Code does not apply to sixteen-year-old juveniles alleged to have committed non-felony traffic violations.

In view of this clear expression of legislative intent, we believe that traffic accident reports describing traffic accidents involving children do not acquire the protection provided juvenile records by Chapter 211. Instead, it is our opinion that traffic accident reports are public records within the meaning of Chapter 610. They are records not of children, but of traffic accidents. Thus, if a non-felony traffic offense has been committed, and the alleged perpetrator is a child sixteen years of age, he or she is not entitled to the protection of Chapter 211, and his or her name should be released. If the alleged perpetrator of the offense is a child under the age of sixteen years, we believe that his or her name may not be released. However, other information concerning the accident may be made available to inquiring parties.

CONCLUSION

It is the opinion of this office that peace officers, upon request: (1) must release the names of juveniles involved in traffic accidents when such juveniles are not alleged to have violated any state or municipal traffic ordinances or regulations in connection with such accidents; (2) must release the names of sixteen-year-old juveniles who are alleged to have violated non-felony state or

The Honorable Gary D. Sharpe

municipal traffic ordinances or regulations in connection with a traffic accident; (3) may not release the names of juveniles who are alleged to have violated state or municipal traffic ordinances or regulations the violations of which are felonies; (4) may not release the names of juveniles under the age of sixteen who are alleged to have violated state or municipal traffic ordinances or regulations; and (5) consistent with this opinion's holding on the release of names, must release other pertinent information concerning a traffic accident to inquiring parties.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Nancy Kelley Baker.

Very truly yours,

A handwritten signature in dark ink, reading "John Ashcroft". The signature is written in a cursive, slightly stylized font. The first name "John" is written with a large, looping 'J'. The last name "Ashcroft" is written with a prominent 'A' and a trailing flourish.

JOHN ASHCROFT
Attorney General

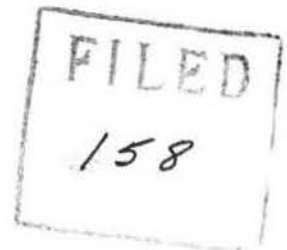
SOIL AND WATER DISTRICTS COMMISSION:
REORGANIZATION ACT:
GOVERNOR:
DEPARTMENT OF NATURAL RESOURCES:

Members of State Soil and
Water Districts Commission
are to be appointed pursuant
to Section 10.4 of Reorgani-
zation Act.

December 3, 1981

OPINION NO. 158

Fred A. Lafser
Director
Department of Natural Resources
1915 Southridge Drive
Jefferson City, Missouri 65101



Dear Mr. Lafser:

This opinion is in response to your question asking whether the appointment of the members of the State Soil and Water Districts Commission is governed by the provisions of Section 10.4, Appendix B, of the Omnibus State Reorganization Act of 1974, or by the provisions of subsection 2 of Section 278.080, RSMo, as enacted by Senate Bill No. 612 of the 80th General Assembly.

Prior to the enactment of the Omnibus State Reorganization Act, Section 278.080.2, RSMo, provided for the appointment of the members of the State Soil and Water Districts Commission. Such provisions were included in the Revised Statutes of 1978 with no change since the last amendment to that section in 1961, as follows:

The state soil and water districts commission shall be composed of two ex officio members and three farmer members, the latter three to be appointed by the governor of Missouri with the advice and consent of the senate, in the manner herein provided and the vote and authority of each member of this commission shall be equal to the vote and authority of each other member. The two ex officio members shall be the director of the agricultural experiment station of the university of Missouri and the director of the agricultural extension service of the

university of Missouri; and each ex officio member may hold office so long as he shall retain the office from which he shall be serving on the soil and water commission. Each of the three farmer members shall be holding legal title to a farm, and shall be earning at least the principal part of his livelihood from a farm, all at the time of his appointment to the soil and water commission. The farmer members shall each be appointed for a period of three years; except that the first three appointed shall serve terms of one, two and three years respectively, as designated by the governor. All members of the soil and water commission shall be resident taxpayers of Missouri for a period of ten years next preceding their appointment, but no partisan political consideration shall determine their qualifications for appointment to this commission.

Senate Bill No. 612 of the 80th General Assembly repealed Sections 278.070, 278.080 and 278.110, RSMo, relating to soil and water conservation, and enacted three new sections in lieu thereof. Subsection 2 of Section 278.080, as enacted by Senate Bill No. 612, was a verbatim reenactment of subsection 2 of Section 278.080, RSMo 1978.

However, the Omnibus State Reorganization Act which became effective May 2, 1974, provided in Section 10.4:

All the powers, duties and functions of the state soil and water districts commission, chapter 278, RSMo, and others, are transferred by a type II transfer to the department. The state soil and water district commission shall be composed of seven members; five shall be farmers appointed by the director of the department, one shall be the dean of the college of agriculture of the university of Missouri or such successor office as may be designated by the president of the university of Missouri; and one shall be the director of the department of natural resources or his designee.

In our view the question presented here is resolved by the same principles and authorities set forth in our Opinion No. 96, 1981, a copy of which is enclosed.

Fred A. Lafser

Section 10.4 of the Reorganization Act repealed by implication the contrary provisions of subsection 2 of Section 278.080. As we have indicated, there were no changes in subsection 2 of Section 278.080, as enacted by Senate Bill No. 612, and its reenactment by that bill is merely a repeat of the law as it existed prior to the changes made by the Reorganization Act. We are, therefore, of the view that since Section 10.4 of the Reorganization Act superseded subsection 2 of Section 278.080, the mere mechanical inclusion of such subsection in Senate Bill No. 612 without any indication that such provisions were intended to replace the provisions of Section 10.4 of the Reorganization Act leads us to the conclusion that the provisions of the Reorganization Act control.

CONCLUSION

It is the opinion of this office that appointments to the State Soil and Water Districts Commission are to be made pursuant to the provisions of Section 10.4 of the Omnibus State Reorganization Act of 1974 and not under the provisions of subsection 2 of Section 278.080, as enacted by Senate Bill No. 612 of the 80th General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enc: Opinion No. 96 (1981)

Attorney General of Missouri

JEFFERSON CITY

65102

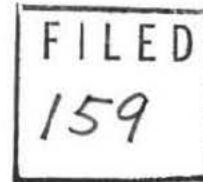
JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

July 24, 1981

OPINION LETTER NO. 159
(Answered by letter--Klaffenbach)

The Honorable Orvey C. Buck
Prosecuting Attorney
Schuyler County Courthouse
Lancaster, Missouri 63548



Dear Mr. Buck:

This letter is in response to your question asking whether the Schuyler County court may draw warrants on the Schuyler County health center fund upon properly authenticated vouchers of the board of health center trustees for payment of travel expenses by members of the board and their employees when the travel expenses are computed in excess of seventeen cents per mile.

Section 33.095, RSMo, provides:

Other provisions of law notwithstanding, in every instance where an officer or employee of the state or any county, except first class counties with a charter form of government, is paid a mileage allowance or reimbursement, the allowance or reimbursement shall be computed at the rate of ten cents per mile unless a higher rate is specifically authorized by statute or order of the commissioner of administration.

In our Opinion No. 112 (1980) we concluded that under the provisions of § 33.095, in every county other than a first class charter county, county employees who are paid a mileage allowance or reimbursement will have that allowance or reimbursement computed at the

The Honorable Orvey C. Buck

rate of seventeen cents per mile as set by order of the commissioner of administration unless a higher rate is specifically authorized by statute.

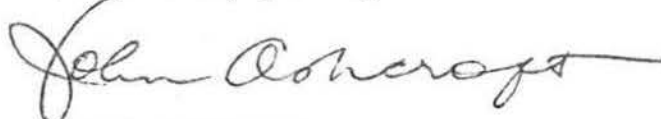
In our Opinion No. 225 (1974) we concluded that a county health center is not a separate and distinct entity but is a part of the county government.

In your correspondence to us you have raised the question of whether subsection 4 of § 205.042, RSMo, which provides that the county board of health center trustees shall have exclusive control of the expenditures of all moneys collected to the credit of the county health center fund, would permit such trustees to set a rate higher than the rate set by the office of administration, by virtue of the exception in § 33.095 permitting a higher rate when "specifically authorized by statute . . ."

It is our view that § 205.042.4 does not constitute specific statutory authorization to set a higher rate for mileage allowance or reimbursement within the meaning of § 33.095.

We believe it is clear that the amount of mileage allowance or reimbursement paid to the board members and employees of county health centers is governed by the provisions of § 33.095 and the regulations of the commissioner of administration issued pursuant to that section.

Very truly yours,



JOHN ASHCROFT
Attorney General

Encs: Atty. Gen. Op. No. 225,
12/31/74, Banta

Atty. Gen. Op. No. 112
5/23/80, Brown

CIRCUIT CLERKS:
DEPUTY CIRCUIT CLERKS:
STATE EMPLOYEES' RETIREMENT SYSTEM:

1. A person who was a deputy circuit clerk in the City of St. Louis on June 30, 1981 and who became a state employee the next day is a

member of the Missouri State Employees' Retirement System and entitled to creditable prior service for all service rendered to the City of St. Louis if the individual complies with the provisions of paragraphs (a), (b), (c) and (d) of § 104.345.3(1) of House Committee Substitute for House Bills Nos. 835, 53, 591 and 830 of the 81st General Assembly.

2. The allowance for creditable prior service provided for in House Bills Nos. 835, 53, 591 and 830 of the 81st General Assembly, for deputy circuit clerks of the City of St. Louis is not contingent upon the City of St. Louis Retirement System consenting to the transfer of funds.

August 18, 1981

OPINION NO. 160

The Honorable Russell E. Egan
Representative, 85th District
Room 405, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Egan:

This opinion is issued in response to your request which reads as follows:

1. Does House Bill No. 835, enacted by the 81st General Assembly, allow deputy circuit clerks in the City of St. Louis all creditable prior service for all service rendered to the City of St. Louis, or does it provide creditable prior service only for service rendered as deputy circuit clerks?

2. Is the allowance for creditable prior service provided for in House Bill 835 contingent upon the City of St. Louis Retirement System consenting to the transfer of funds?

House Committee Substitute for House Bills Nos. 835, 53, 591 and 830 of the 81st General Assembly became effective on May 12, 1981, except with respect to certain provisions which are not relevant here. It repealed certain statutory provisions relating to retirement systems of state officers and employees and enacted in lieu thereof 52 new sections relating to the same subject.

The Honorable Russell E. Egan

It is assumed that the deputy circuit clerks referred to in your opinion request meet the definition of "deputy circuit clerks" as defined in subsection (34) of § 104.310 of the foregoing legislation. In addition, this opinion is applicable only to those individuals who were deputy circuit clerks on June 30, 1981, and who were members of the St. Louis City Employees' Retirement System prior to becoming a state employee on July 1, 1981. With these principles in mind, we consider the first question that you have presented.

Subsection 3(1) of § 104.345 of House Committee Substitute for House Bills Nos. 835, 53, 591 and 830 provides as follows:

3.(1) Notwithstanding any other provision of law to the contrary, any person who is a deputy circuit clerk or division clerk on June 30, 1981, and who becomes a state employee the next day is a member and entitled to creditable prior service for service rendered to the city of St. Louis or to a county, as the case may be, if:

(a) The person was on June 30, 1981, a member of the St. Louis city employees' retirement system, a member of the Missouri local government employees' retirement system under the provisions of sections 70.600 to 70.755, RSMo, or of a county retirement system authorized by law;

(b) The person makes application to the Missouri state employees' retirement system for creditable prior service within 90 days of becoming a state employee;

(c) The person upon becoming a state employee does not withdraw from the city, county or local government retirement system any monies to which he would be entitled by reason of ceasing to be an employee of a county or the city of St. Louis; and

(d) The person when requested to do so by the Missouri state employees' retirement system executes any documents that may be reasonably required to transfer and irrevocably assign to the Missouri state employees' retirement system all of that person's rights and entitlements to a refund from such city, county or local government retirement system upon ceasing to be a city or county employee.

The Honorable Russell E. Egan

The phrase "creditable prior service" is defined in subsection (12) of § 104.310 of House Committee Substitute for House Bills Nos. 835, 53, 591 and 830 which reads as follows:

(12) 'Creditable prior service', the service of an employee which was either rendered prior to September 1, 1957 or prior to the date the employee became a member of this system, and which is creditable and recognized in determining the amount of the member's benefits under this system;

Where statutes are plain and unambiguous, there is no room for construction and they must be applied by courts as they are written by the legislature. United Airlines, Inc. v. State Tax Commission, 377 S.W.2d 444 (Mo. 1964). In response to your first question, it is our view that the language of the statute clearly and unambiguously provides that any person who is a deputy circuit clerk in the City of St. Louis on June 30, 1981, and who becomes a state employee the next day is a member of the Missouri State Employees' Retirement System and entitled to receive creditable prior service for all service rendered to the City of St. Louis if the individual complies with the requirements of paragraphs (a), (b), (c) and (d) of subsection 3(1) of § 104.345 of House Committee Substitute for House Bills Nos. 835, 53, 591 and 830 of the 81st General Assembly.

In regard to your second question, subsection 3(4)(a) of § 104.345 of House Committee Substitute for House Bills Nos. 835, 53, 591 and 830 provides as follows:

(4)(a) In lieu of the city of St. Louis or a county continuing to be obligated to pay the salary of any such deputy circuit clerk or division clerk who makes application for creditable prior service, the city of St. Louis or the particular county shall contribute to the Missouri state employees' retirement system an amount actuarially determined to be sufficient to fund the creditable prior service of those deputy circuit clerks and division clerks who become state employees on July 1, 1981, and who elect to receive creditable prior service in the manner provided in subdivision (1)(b) of this subsection 3. (emphasis ours)

Section 104.345.3(4)(d) provides that the contribution to be made by the city shall be reduced by the amount which is actually paid over to the Missouri State Employees' Retirement System by certain transfers or assignments, and § 104.345.3(4)(e) prescribes the methods

The Honorable Russell E. Egan

whereby such contributions "shall be paid" by the city. Finally, § 104.345.3(4)(f)(ii) provides for certain penalties if the city fails to make any payment due the Missouri State Employees' Retirement System.

Therefore, in response to your second question, it is our view that the recognition of creditable prior service is not contingent upon the City of St. Louis Retirement System consenting to the transfer of funds.

CONCLUSION

It is the opinion of this office that:

1. A person who was a deputy circuit clerk in the City of St. Louis on June 30, 1981 and who became a state employee the next day is a member of the Missouri State Employees' Retirement System and entitled to creditable prior service for all service rendered to the City of St. Louis if the individual complies with the provisions of subparagraphs (a), (b), (c) and (d) of § 104.345.3(1) of House Committee Substitute for House Bills Nos. 835, 53, 591 and 830 of the 81st General Assembly.

2. The allowance for creditable prior service provided for in House Bills Nos. 835, 53, 591 and 830 of the 81st General Assembly, for deputy circuit clerks of the City of St. Louis is not contingent upon the City of St. Louis Retirement System consenting to the transfer of funds.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

65102

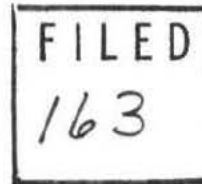
(314) 751-3321

August 18, 1981

OPINION LETTER NO. 163

(Answered by letter--Wieler)

The Honorable John Schneider
State Senator, 14th District
State Capitol Building, Room 422
Jefferson City, Missouri 65101



Dear Senator Schneider:

This letter is written in response to your request for an opinion on the following subject:

"May a fire protection district in St. Louis County submit a proposition to the district voters for an increase in the tax levy to pay salary increases to the district's personnel?"

"If submitting such an issue is possible, by what majority must the tax rate pass?"

In your opinion request, you state that the district is currently operating at the maximum tax levy allowed by the Missouri statutes. This being so, the answer to your first question must be in the negative. Political subdivisions in Missouri may exercise taxing power only in accordance with power granted by the General Assembly. Art. X, § 1 of the Missouri Constitution. The taxing authority contained in Chapter 321 of the Missouri statutes dealing with fire protection districts sets forth a maximum levy which can be imposed. See §§ 321.240 and 321.610, RSMo Supp. 1980, and § 321.241, RSMo 1978. Since this levy has been attained, further increases are possible only for specified purposes subsequent to a vote of the people, as contained in §§ 321.350 to 321.380, RSMo 1978. Salary increases for personnel working for the fire protection district are not specifically mentioned therein and, therefore, cannot be used to justify an increase in the tax levy above the statutory maximum.

The Honorable John Schneider
Page 2

Since the maximum levy set forth in the statutes cannot be expanded to provide for salary increases to the personnel working for a fire protection district, it will be unnecessary to deal with your second question.

Very truly yours,

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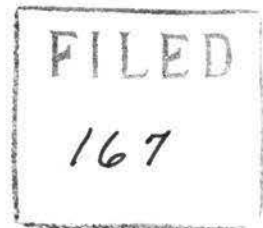
JOHN ASHCROFT
Attorney General

TEACHERS: Under Section 168.221, a metropolitan
TEACHER EMPLOYMENT: school district (1) is not required to
SCHOOL DISTRICTS: give a probationary teacher any reason
for nonretention of the teacher for the
subsequent school year, and (2) is not required to give a probationary
teacher whose work has been determined unsatisfactory in March of a
given year a statement of the reason or reasons for nonretention or a
written statement setting forth the nature of the teacher's incompetency, or to allow the teacher a period of one semester within which to improve.

December 21, 1981

OPINION NO. 167

The Honorable Ron Auer
Representative, District 99
3120 South Compton
St. Louis, Missouri 63118



Dear Representative Auer:

This official opinion is issued in response to your request which asks:

1. Whether the Superintendent of Schools of the Board of Education of the City of St. Louis can, with the approval of the Board, notify a probationary teacher before April 15 in any year that the teacher will not be retained for the subsequent school year and that the teacher's services are terminated at the end of the school year, on the basis of any reason whatsoever, or for no reason at all, so long as the reason is not an impermissible constitutional one (for example, because of the teacher's race or because of the teacher's exercise of First Amendment rights).
2. If it is determined by the Superintendent and Board in March of a given year that the work of a probationary teacher is unsatisfactory, may the Superintendent, with the approval of the Board, notify the teacher before the fifteenth day of April that the teacher will not be retained for the subsequent school year and that the teacher's services

are thus terminated, without stating to the teacher the reason or reasons for the nonrenewal, without furnishing the teacher with a written statement setting forth the nature of the teacher's incompetency and without allowing the teacher a period of one semester within which to improve?

The school district of the City of St. Louis is a "metropolitan school district" as defined in Sections 160.011(6) and 162.571 (all statutory references herein are to RSMo 1978); therefore, the statute applicable to termination of a probationary teacher is Section 168.221. Subsection 1 of Section 168.221 provides as follows:

The first three years of employment of all teachers and principals entering the employment of the metropolitan school district shall be deemed a period of probation during which period all appointments of teachers and principals shall expire at the end of each school year. During the probationary period any probationary teacher or principal whose work is unsatisfactory shall be furnished by the superintendent of schools with a written statement setting forth the nature of his incompetency. If improvement satisfactory to the superintendent is not made within one semester after the receipt of the statement, the probationary teacher or principal shall be dismissed. The semester granted the probationary teacher or principal in which to improve shall not in any case be a means of prolonging the probationary period beyond three years and six months from the date on which the teacher or principal entered the employ of the board of education. The superintendent of schools on or before the fifteenth day of April in each year shall notify probationary teachers or principals who will not be retained by the school district of the termination of their services. Any probationary teacher or principal who is not so notified shall be deemed to have been appointed for the next school year.

Section 168.221 establishes two classifications of teachers: probationary teachers and permanent teachers. These classifications are similar to those established under the Missouri Teacher Tenure Act, Sections 168.102-168.130.

Subsection 1 of Section 168.221 is similar to subsection 2 of Section 168.126 in that it prescribes the procedures for two distinct actions relative to probationary teachers: (1) dismissal of a probationary teacher because of unsatisfactory work, and (2) nonretention

Honorable Ron Auer

of a probationary teacher for the next school year. This office has previously determined that Section 168.126.2 does not require a board of education to give a probationary teacher ninety days notice prior to April 15 of its intention not to rehire the teacher because of incompetency, and that the only requirement under Section 168.126.2 is that notice be given prior to April 15 of the board's intention not to rehire, otherwise the teacher is automatically rehired. See Opinion No. 18 (1972).

The conclusion we reached in Opinion No. 18 (1972) has since been reinforced by recent court decisions in Missouri. The St. Louis Court of Appeals in Revelle v. Mehlville School District R-9, 562 S.W.2d 175 (Mo.App. 1978), held that the only obligation of a school board with respect to nonretention of a probationary teacher under the Teacher Tenure Act is to give notice on or before April 15 of its intent not to rehire the teacher. The issue involved in Revelle was whether the teacher should be given ninety days after receipt of notification to make necessary improvements in his work performance. Similarly in White v. Scott County School District No. R-V, 503 S.W.2d 35 (Mo.App. 1973), the Springfield Court of Appeals stated that:

Nothing in the Teacher Tenure Act has altered the right of a board of education to determine ex parte what nontenured probationary teachers it will or will not reemploy for the succeeding school year [citation omitted] except insofar as termination may be predicated and proved to have been on impermissible constitutional reasons Id. at 37.

We believe that the views expressed in Opinion No. 18 (1972) and the above-cited decisions are equally applicable to Section 168.221.1. That is, a metropolitan school district's only obligation is to give notice before April 15 of its intention not to rehire a probationary teacher. There is no additional requirement that the superintendent of schools give a reason for not rehiring the teacher.

Your second question asks whether the superintendent of schools, having determined in March that the work of a probationary teacher is unsatisfactory, may notify the teacher on or before April 15 that he or she will not be retained for the subsequent school year without stating to the teacher the reason or reasons for the nonrenewal, without furnishing the teacher with a written statement setting forth the nature of the teacher's incompetency, and without allowing the teacher a period of one semester within which to improve. Our Opinion No. 18 (1972) and the above-cited cases hold that the only requirement concerning nonrenewal of a teacher's contract is notification prior to April 15 of the current school year. Opinion No. 18 notes, with respect to Section 168.126.2, the potential problem of applying the dismissal procedure to the nonrenewal provisions:

Honorable Ron Auer

Assuming arguendo that the ninety day notice provision applied to rehiring as well as termination, suppose the probationary teacher's incompetency first exhibited itself in late February. If the ninety day notice were given immediately, it would be less than ninety days until April 15. The board would have to offer the teacher a contract for the next year even though he was under a ninety day notice. Suppose, further, the teacher failed to correct the fault and was terminated the end of May. This situation would then exist -- probationary teacher's current contract terminated but by operation of law the teacher would have a contract for the next school year. We do not believe the legislature intended for such an absurd result to be a possibility.

CONCLUSION

It is the opinion of this office that under Section 168.221, RSMo, a metropolitan school district (1) is not required to give a probationary teacher any reason for nonretention of the teacher for the subsequent school year, and (2) is not required to give a probationary teacher whose work has been determined unsatisfactory in March of a given year a statement of the reason or reasons for nonretention or a written statement setting forth the nature of the teacher's incompetency, or to allow the teacher a period of one semester within which to improve.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Leslie Ann Schneider.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Enc: Opinion No. 18 (1972)

CONSTITUTIONAL LAW:
MISSOURI HOUSING DEVELOPMENT
COMMISSION:

The fees and revenues of MHDC
are not subject to constitutional
and statutory mandates that all
state revenue and other moneys
from any source whatsoever be deposited in the state treasury and that
the MHDC fees and revenues are not subject to appropriation by the General
Assembly.

October 2, 1981

OPINION NO. 168

Honorable James F. Antonio, C.P.A.
State Auditor
State Capitol
Jefferson City, Missouri 65101



Dear Dr. Antonio:

This opinion is in response to your questions:

Are the fees that are received by the
Missouri Housing Development Commission required
to be deposited in the state treasury?

Is the expenditure of the fees collected
by the Missouri Housing Development Commission
subject to control by the legislature through
the appropriation process?

These questions comprised No. 5 of your request of an opinion from
this office. The other four questions of your request were separated
for answer in a separate opinion assigned number 176.

You outlined the facts giving rise to your question in the fol-
lowing manner:

I am informed that the Missouri Housing
Development Commission does not deposit the
money it collects in fees into the state treasury.
I am informed that the Missouri Housing Development
Commission pays most of its operating costs (non-
payroll costs) directly from its own accounts
without depositing the money in the state treasury.
Thus, these expenditures are never processed through
the state accounting system. The legislature does

Honorable James F. Antonio

appropriate money to the Missouri Housing Development Commission, but since the commission does not deposit its money in the state treasury and its expenditures are not processed through the state accounting system, the Division of Budget and Planning does not show that any money from the commission's appropriation has been spent. Consequently, the commission spends its money as it so chooses, sometimes exceeding the amount specified by the legislature in the appropriation to MHDC for non-payroll expenses.

The General Assembly created the Missouri Housing Development Commission (MHDC) as "a governmental instrumentality of the state of Missouri . . . which shall constitute a body corporate and politic." Section 215.020.1, RSMo 1978. Appendix B(1) § 3, RSMo 1978, provides that MHDC shall be assigned to the Department of Consumer Affairs, Regulation and Licensing "but shall remain a governmental instrumentality of the State of Missouri and shall constitute a body corporate and politic."

The General Assembly has authorized MHDC to collect fees in three separate sections of Chapter 215. Section 215.030(8) empowers MHDC:

To collect reasonable fees and charges in connection with making and servicing its loans, notes, bonds, obligations, commitments, and other evidences of indebtedness, and in connection with providing technical, consultative and project assistant services. Such fees and charges shall be limited to the amounts required to pay the costs of the commission, including operating and administrative expenses, and reasonable allowances for losses which may be incurred

Section 215.040 mandates that MHDC:

[C]harge a reasonable fee on all loans not federally insured to insure said loans. The proceeds of said fees shall be deposited in a separate fund to be known as the 'Housing Insured Loan Fund'. This fund shall be deposited when received in a bank approved for deposit of state funds. No moneys shall be withdrawn from the fund except to be used for the purchase of mortgage insurance or to pay for any losses on said loans.

Honorable James F. Antonio

Section 215.130 authorizes MHDC, when issuing any notes or bonds, to pledge "all or any part of any fees and charges made or received by the commission." Section 215.130 does not designate the source of fees to which it refers. While these are the only references in Chapter 215 to fees, there are numerous other references to income and its sources.

The issue is whether or not such fees and other revenues of MHDC are subject to the state constitutional provisions of Art. III, § 36 and Art. IV, § 15 which mandate that all revenue collected and moneys received by the state from any source whatsoever must be deposited in the state treasury. Specifically, Art. III, § 36 provides in pertinent part:

All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law.

Article IV, § 15 outlines the duties of the state treasurer and provides in pertinent part:

All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law.

In addition to these constitutional provisions, § 33.080, RSMo 1978, provides in pertinent part:

All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals of not more than thirty days, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the general assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated.

Honorable James F. Antonio

Thus, the key to determining whether or not the fees and other revenues collected by MHDC must be deposited in the state treasury pursuant to these constitutional and statutory provisions is a determination of whether or not MHDC is "the state", as set out in the constitutional provisions, or is an agency of the state, as set out in § 33.080. We are of the opinion that MHDC is not an agency within the purview of § 33.080, and its fees and other revenues are not "revenue collected and money received" as that term is used in Art. III, § 36 and Art. IV, § 15.

Chapter 215 read in its entirety, makes it clear that the legislature intended MHDC to be a self-sufficient, independent instrumentality, invested with specific powers and authority to perform a specific function. The fees called for in § 215.030(8) are to "pay the costs of the commission, including operating and administrative expenses, and reasonable allowances for losses which may be incurred" Furthermore, § 215.030(9) authorized MHDC to invest any funds not required for immediate disbursement. This provision clearly negates any contention that such funds are to be invested by the state treasurer as state moneys pursuant to Art. IV, § 15.

The other 23 powers granted MHDC in § 215.030 are to permit MHDC to act with the flexibility and continuity required for successfully providing low-income or moderate-income housing in Missouri--a flexibility and continuity which the state could not provide itself. Thus, the legislature chose to create a necessary instrumentality. Among other things, the statute authorizes MHDC to accept gifts, § 215.030(6); to make and execute contracts and other instruments, § 215.030(7); to sue and be sued, § 215.030(10); to adopt an official seal, § 215.030(11); to enter into agreements or other transactions with any federal or state agency, any person and any domestic or foreign partnership, corporation, association or organization, § 215.030(14); to acquire real property in its own name and to sell it to a buyer, § 215.030(15); and to borrow money to carry out its purposes, § 215.030(20).

These provisions, coupled with the provisions creating MHDC as a governmental instrumentality constituting a body corporate and politic, make it clear that the legislature intended MHDC to be an entity distinct from the state, established for the specific purpose of providing low-income or moderate-income housing to residents of Missouri. Although MHDC represents the state in the performance of its duties, and, in fact, has three elected state officials among its commissioners, it is but an instrumentality through which the state provides a service it could not otherwise provide. The powers granted MHDC by the legislature in no wise attribute the state's sovereignty to it. MHDC cannot be designated as the state's alter ego. State ex rel. Thompson v. Board of Regents for Northeast Missouri State Teachers' College, 264 S.W. 698, 700 (Mo. banc 1924).

Honorable James F. Antonio

The Supreme Court of Missouri considered the question of whether or not the revenues of independent authorities or commissions similar to MHDC were subject to Art. III, § 36, in State ex inf. Danforth ex rel. Farmers' Electric Cooperative, Inc. v. State Environmental Improvement Authority, 518 S.W.2d 68 (Mo. banc 1975). At issue in that case were the revenues of the State Environmental Improvement Authority which was created by § 260.010, establishing the authority as "a governmental instrumentality of the state of Missouri . . . which shall constitute a body corporate and politic" (a provision identical to § 215.020.1). The court concluded that the State Environmental Improvement Authority was an independent agency and that its revenues and moneys were not state funds within the meaning of Art. III, § 36.

The same court construed a virtually identical provision, § 360.020, creating the Health and Educational Facilities Authority as "a body politic and corporate" constituting "a public instrumentality and body corporate." Menorah Medical Center v. Health and Educational Facilities Authority, 584 S.W.2d 73 (Mo. banc 1979). The court concluded that the revenues and moneys of the authority were not subject to the provisions of Art. III, § 36 and Art. IV, § 15. The court stated:

[T]he Authority, though it is a public body and instrumentality, is an entity apart from the state. Thus, even if its funds are public funds, they may not be state funds subject to [Art. III, § 36]. Id. at 82.

We believe that this reasoning also applies to MHDC. Therefore, we conclude that the General Assembly did not intend that MHDC moneys and revenues be subject to the constitutional and statutory provisions requiring state moneys to be deposited in the state treasury.

This conclusion is further enhanced by reference to §§ 215.200 and 215.230. Section 215.200 provides that MHDC is exempt from any state or local taxes and assessments. If the legislature had intended that MHDC funds be deposited in the state treasury because they were state moneys, this provision would be superfluous and meaningless. The same is true of § 215.230 which provides that all rights and properties of MHDC, upon its termination or dissolution, shall be vested in the state.

The same rationale applies to your second question concerning whether or not MHDC fees are subject to control by the legislature through the appropriation process. Because MHDC revenues are not required to be deposited in the state treasury, there clearly is no need for the appropriation process required by the state constitution or any statutory provision.

Honorable James F. Antonio

CONCLUSION

It is, therefore, the opinion of this office that the fees and revenues of MHDC are not subject to constitutional and statutory mandates that all state revenue and other moneys from any source whatsoever be deposited in the state treasury and that the MHDC fees and revenues are not subject to appropriation by the General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul M. Spinden.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long, sweeping horizontal stroke extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65102

(314) 751-3321

October 8, 1981

OPINION LETTER NO. 170

The Honorable Kaye Steinmetz
Representative, District 57
13 Longhenrich Drive
Florissant, Missouri 63031

170

Dear Representative Steinmentz:

This letter is issued in response to your request for an opinion on the following questions:

1. May a fire protection district charge and collect from an insurance company when the district provides ambulance service for a resident of the district and the resident owns an insurance policy which will pay for ambulance services?
2. May a fire protection district charge and collect from insurance companies, or other sources, for answering calls outside of its boundaries?
3. Will the answers to questions number 1 and 2 be different if the property owners of the district are assessed a tax of 15 cents per \$100 assessed valuation to pay for ambulance services?
4. Will the answer to question number 1 (in light of question 3) be different if the person receiving the ambulance service is not a resident of the

The Honorable Kaye Steinmetz

district but receives the service of the fire protection district's ambulance when his injury is suffered while in the district?

In addition to their other powers and duties, fire protection districts are authorized to provide emergency ambulance service, and to levy a tax not to exceed fifteen cents on the \$100 assessed valuation to be used exclusively to supply funds for the operation of such service, if the majority of the voters within the district approve the proposition. See §§ 321.225 and 321.620, RSMo 1978. However, until the passage of § 321.226, RSMo 1980 Supp. (Laws of 1979, S.B. 237, § 1), no law existed which would allow fire protection districts to charge for such services. Section 321.226 provides as follows:

1. Any fire protection district which is authorized to provide emergency ambulance service within its district may provide such emergency ambulance service outside its district. When providing emergency ambulance service, a fire protection district may assess and collect a fee for such service.

2. As used in this section "emergency" means a situation resulting from a sudden or unforeseen situation or occurrence that requires immediate action to save life or prevent suffering or disability.

Since the effective date of § 321.226, any fire protection district authorized to provide emergency ambulance service may provide such service both within and without its district, and may assess and collect a fee for providing such service. The statute does not prescribe a particular manner of collection or specify the person from whom the fee is to be received.

Therefore, in answer to questions 1 and 2 of your opinion request, it is our opinion that a fire protection district rendering emergency ambulance service may collect the fee owed by an individual who has received such service directly from an insurance company providing insurance coverage for that

The Honorable Kaye Steinmetz

individual. In this respect, the fire protection district stands in the same position as any other provider of service to individuals covered by insurance. That is, although the individual is liable for such payment and must be looked to for satisfaction of all charges unpaid, the fire protection district may, if it so chooses, make orderly arrangements for direct payment from the insurance company.

Furthermore, the facts outlined in your questions 3 and 4 would not cause our answer to questions 1 and 2 to be different. Sections 321.225 and 321.620, RSMo 1978, authorize the majority of voters within a fire protection district to approve a proposition to furnish emergency ambulance service and to levy a tax not to exceed fifteen cents on the \$100 assessed valuation to be used exclusively to supply funds for the operation of such service. It is important to note that the statutes set an upper limit only; that is, a levy not to exceed fifteen cents on \$100 assessed valuation. In addition, the statutes provide that the fire protection district shall exercise the same powers and duties in operating an emergency ambulance service that it does in operating its fire protection service.

Sections 321.240 and 321.610, RSMo 1980 Supp., provide that the board in charge of each fire protection district shall determine the amount of money necessary to be raised each year by taxation which along with other revenues will raise the amount required by the district to pay for its operations. The rate of levy is set accordingly. Therefore, to the extent that fees for emergency ambulance service are collected and available to offset the cost to the district of operating the emergency ambulance service, the yearly levy can be adjusted accordingly, mindful only of the fact that it cannot exceed the maximum of fifteen cents per \$100 assessed valuation.

Very truly yours,



JOHN ASHCROFT
Attorney General

DEPARTMENT OF PUBLIC SAFETY:
LIQUOR:
LICENSES:

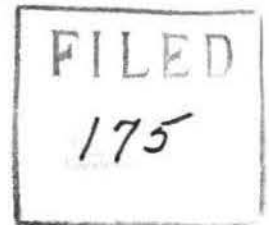
The supervisor of the Division
of Liquor Control may not issue
a license for the sale of light
wines not in excess of fourteen

percent by weight by the drink at retail for consumption on the
premises where sold in cities under 20,000 inhabitants or unin-
corporated areas outside the city limits unless a majority of
the qualified voters of said city have authorized him to do so.
The supervisor of the Division of Liquor Control retains his
statutory discretion to issue a license for sale by the drink
at retail for consumption on the premises where sold of light
wines not in excess of fourteen percent in cities and unin-
corporated areas not within the purview of Section 311.090.

December 24, 1981

OPINION NO. 175

Edward D. Daniel, Director
Department of Public Safety
P. O. Box 649
Jefferson City, Missouri 65102



Dear Mr. Daniel:

This opinion is in answer to your inquiry on the following
issue:

May the supervisor of the Division of Liquor
Control issue a license for the sale of light
wines not in excess of fourteen percent by
weight for consumption on the premises where
sold in unincorporated areas and in cities
under 20,000 inhabitants which has not been
authorized by a vote of the majority of the
qualified voters of said city?

We believe your inquiry is based on changes in Sections
311.090 and 311.200 wrought by Senate Bill 126, 81st General
Assembly, effective September 28, 1981.

Repealed Section 311.090, RSMo 1978, provided for a
local option whereby a majority of the registered voters in
cities with a population greater than 500 and less than
20,000 could authorize the supervisor of the Division of
Liquor Control to issue a retail liquor by the drink license.
As an exception to the local option requirement, repealed
Section 311.090 permitted the supervisor to issue a license

Edward D. Daniel, Director

to sell malt liquor containing alcohol not in excess of five percent by weight without local voter approval. The former Section 311.090 also contained a second provision requiring a licensee to provide a surety bond for the faithful performance of his duties under the law.

During the 81st General Assembly, the legislature approved Senate Bill 126 which repealed and reenacted Section 311.090. The provision requiring a performance bond was deleted. The local option provision was reenacted without change.

Senate Bill 126 amended Section 311.200 as well. Of import to your request is the amendment to Section 311.200.3 as follows:

3. Malt liquor containing alcohol in excess of three and two-tenths percent by weight and not in excess of five percent by weight, manufactured from pure hops or pure extract of hops or pure barley malt or whole sale grains or cereals and wholesome yeast and pure water, or light wines containing not in excess of fourteen percent of alcohol by weight exclusively from grapes, berries and other fruits and vegetables, or both such malt liquor and wine may be sold by the drink at retail for consumption on the premises where sold, when the person, partnership or corporation desiring to sell such malt liquor or wine, or both, by the drink at retail for consumption on the premises where sold shall have been licensed so to do by the incorporated city and county in which he proposes to operate his business, and has procured a license so to do from the supervisor of liquor control. No licensee authorized to sell malt liquor or wine, or both, at retail by the drink for consumption on the premises where sold, shall be permitted to obtain a license for the sale of intoxicating liquors, other than malt liquor or wine, or both, in the original package, except in cities where the sale of all intoxicating liquors, by the drink at retail for consumption on the premises where sold, is permitted by law. For every license issued for the sale of malt liquor or wine, or both, as herein defined, at retail by the drink for consumption on the premises where sold, the licensee shall pay to the director of revenue the sum of thirty-five dollars per year, which license shall also permit the holder thereof to sell nonintoxicating beer as defined in Chapter 312, RSMo [language added by amendment emphasized].

Edward D. Daniel, Director

Section 311.200.3, as amended by Senate Bill 126, 81st General Assembly, includes light wines in the same class of intoxicating liquor as malt liquor for purposes of licensing. However, Section 311.090, as amended, does not include light wine as an exception to the local option requirement. Further, the legislature has not amended Section 311.150, RSMo 1978, which provides:

If a majority of the votes cast on the question held under the provisions of this chapter shall be against the sale of intoxicating liquor containing alcohol in excess of five percent by weight, by the drink at retail for consumption on the premises where sold, it shall not be lawful for any person within the limits of such incorporated city to, directly or indirectly, sell, give away or barter in any manner whatever intoxicating liquor, by the drink at retail for consumption on the premises where sold, except malt liquor, containing alcohol not to exceed five percent by weight, under proper license, in any quantity whatever, under the penalties prescribed in this chapter. (emphasis added)

In rendering our opinion we must rely on the rules of statutory construction adopted by the courts of this state, the ultimate aim of which is to determine and give effect to the intent of the legislature. City of Willow Springs v. Missouri State Librarian, 596 S.W.2d 441, 444-445 (Mo. banc 1980); Missouri Pacific Railroad Company v. Kuehle, 482 S.W.2d 505, 509 (Mo. 1972). In addition, we are obliged to harmonize conflicting statutes, where possible, to give effect to the legislature's intent.

Statutes must be read in pari materia and, if possible, given effect to each clause and provision. Where one statute deals with a subject in general terms and another deals with the same subject in a more minute way, the two should be harmonized if possible, but to the extent of any repugnancy between them the definite prevails over the general [citations omitted]. State ex rel. Fort Zumwalt School District v. Dickherber, 576 S.W.2d 532, 536-537 (Mo. banc 1979).

Edward D. Daniel, Director

In ascertaining the intent of the legislature, courts have traditionally exercised caution in interpreting a statute beyond the scope of its expressed language. The legislature is presumed to have acted with knowledge of the subject matter and scope of existing law.

Provisions not plainly written in the law, or necessarily implied from what is written, should not be added by a court under the guise of construction to accomplish an end that the court deems beneficial. Wilson v. McNeal, et al., 575 S.W.2d 802, 809 (Mo.App., St.L.D. 1978).

Our review of the pertinent law and Senate Bill 126, 81st General Assembly, leads us to believe that the General Assembly intended to change the status of light wine from an intoxicating liquor which requires a three hundred dollar license for sale at retail by the drink, to an intoxicating liquor which requires a thirty-five dollar license for the same privilege (See Section 311.200.4). Section 311.200 defines and classifies various original package and retail by the drink licenses. It does not empower the supervisor of Liquor Control to issue a retail by the drink license in the absence of local approval. The legislature did not alter the provisions of Section 311.090 requiring local authorization prior to the issuance of a liquor by the drink at retail for consumption on the premises license. Section 311.090 continues to require voter authorization before a liquor by the drink at retail for consumption on the premises where sold license may be issued by the supervisor; the sale of malt liquor by the drink at retail for consumption on the premises where sold is the sole exception to the local authorization requirement.

We believe Senate Bill 126, 81st General Assembly, expresses the legislature's intent to decrease the licensing fee for a license to sell light wine by the drink at retail for consumption on the premises where sold without creating an exception from the requirement of Section 311.090 for local voter authorization prior to the issuance of such a license by the supervisor.

CONCLUSION

It is therefore the opinion of this office with respect to the issuance of a license for the sale of light wine not in excess of fourteen percent by weight for consumption on the premises where sold that:

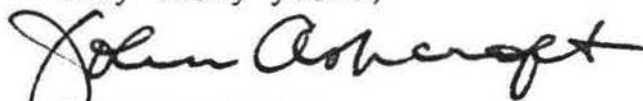
Edward D. Daniel, Director

1. The supervisor of the Division of Liquor Control may not issue a license for the sale of light wines not in excess of fourteen percent by weight by the drink at retail for consumption on the premises where sold in cities under 20,000 inhabitants or unincorporated areas outside the city limits unless a majority of the qualified voters of said city have authorized him to do so.

2. The supervisor of the Division of Liquor Control retains his statutory discretion to issue a license for sale by the drink at retail for consumption on the premises where sold of light wines not in excess of fourteen percent in cities and unincorporated areas not within the purview of Section 311.090.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Henry T. Herschel.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", written in a cursive style.

JOHN ASHCROFT
Attorney General

WORKERS' COMPENSATION:
CRIME VICTIMS:

The Workers' Compensation Fund, Section 287.710, may not be expended for salaries and expenses relating to the administration of Chapter 595, pertaining to crime victims.

December 17, 1981

OPINION NO. 177

Richard R. Rousselot
Director
Division of Workers' Compensation
Department of Labor and Industrial Relations
Post Office Box 58
Jefferson City, Missouri 65102



Dear Mr. Rousselot:

This opinion is issued in response to your question asking:

Whether tax collected for implementing the Workers' Compensation Fund under Section 287.710, RSMo and earmarked for such implementation can be used for salaries and administrative expenses involving crime victims, especially in view of Section 8, Paragraph 2 of the House Committee Substitute for House Bills Nos. 41, 319, 429, 478 and 228 [sic] truly agreed to and finally passed by the 81st General Assembly, commonly referred to as the "Crime Victim's Bill", which states, in part, as follows:
". . . .2. All awards made to injured victims under this act and all appropriations for administration of this act, except Sections 9 and 10, shall be made from the Crime Victim's Compensation Fund. . . ."

You further state:

As Director of the Division of Workers' Compensation, I am charged with the responsibility of administering both the

Richard R. Rousselot

Workers' Compensation Fund and the Crime Victim's Compensation Fund, and I am therefore concerned that there be no legal question as to the complete separation of administrative expenses and salaries between the Workers' Compensation Fund and the Crime Victim's Compensation Fund.

The Workers' Compensation Fund is established under Section 287.710, RSMo Supp. 1981. Subsection 4 of that section states:

The tax collected for implementing the workers' compensation fund, and any interest accruing thereon, under the police power of the state from those specified in sections 287.690, 287.715, and 287.730 shall be used for the purpose of making effective the law to relieve victims of industrial injuries from having individually to bear the burden of misfortune or becoming charges upon society and for the physical rehabilitation of the victims of industrial injuries, and for no other purposes. It is hereby made the express duty of every person exercising any official authority or responsibility in and for the state of Missouri sacredly to safeguard and preserve all funds collected, and any interest accruing thereon, under and by virtue of sections 287.690, 287.715, and 287.730 for the purposes hereinabove declared.

Senate Committee Substitute for House Committee Substitute for House Bills Nos. 41, 319, 429, 478 and 228, 81st General Assembly, has been codified as Chapter 595 RSMo Supp. 1981. Section 595.045 provides in relevant part:

1. There is established in the state treasury the "Crime Victims' Compensation Fund". . . .
2. All awards made to injured victims under sections 595.010 to 595.070 and all appropriations for administration of sections 595.010 to 595.070, except sections 595.050 and 595.055, shall be made from the crime victims' compensation fund. . .

Responsibility for the administration of the Crime Victims Compensation Fund is given to the Division of Workers' Compensation, Section 595.015, effective January 1, 1983, Section 595.070.

Richard R. Rousselot

It is clear that the Workers' Compensation Fund and the Crime Victims' Compensation Fund may not be commingled. The language of Section 287.710.4 is unambiguous. It is made the duty of state officials to "sacredly" safeguard and preserve the Workers' Compensation Fund for the purposes declared. Those purposes do not include expenses relating to the administration of Chapter 595. Likewise, Section 595.045.2 expressly provides that awards made to crime victims, and necessary administrative expenses, shall be paid from the Crime Victims' Compensation Fund.

That the total separation of the two funds is required is also borne out by Section 287.690, RSMo 1978 which provides that certain insurance carriers shall pay a premium tax "[f]or the purpose of providing for the expense of administering this chapter and providing for the maintenance of the second injury fund." No mention is made of the administration of Chapter 595.

Since the statutory language is so clear, there can be no other interpretation but that the two funds must be separately maintained and administered, and can be expended only for their respective statutory purposes. Neither fund may be used for the purposes of the other.

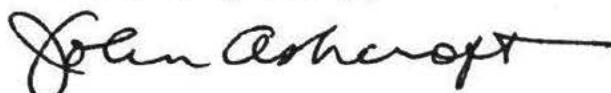
The Supreme Court of Missouri has stated that, in the construction of a statute, the intent of the general assembly must be ascertained from the language used, and effect must be given to that intent. Goldberg v. Administrative Hearing Commission, 609 S.W.2d 140, 144 (Mo. banc 1980). It was the intent of the general assembly that the funds which are the subject of this opinion remain separate.

CONCLUSION

It is the opinion of this office that the Workers' Compensation Fund established under Section 287.710, RSMo Supp. 1981, may not be used for salaries and expenses relating to the administration of Chapter 595, RSMo Supp. 1981, providing for compensation of and services for certain crime victims.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Jay D. Haden.

Yours very truly,



JOHN ASHCROFT
Attorney General

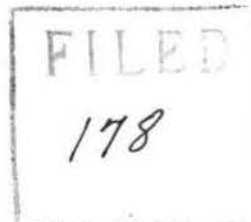
CONFLICT OF INTEREST:
PRESIDING JUDGE COUNTY COURT:
SCHOOL BOARDS:
SCHOOL CONTRACTS:

Presiding judge of county court
is not a regular member of school
board under Section 162.301.3,
RSMo Supp. 1981, and, therefore,
Section 105.458, RSMo, is not ap-
plicable to presiding judge.

December 17, 1981

OPINION NO. 178

The Honorable John G. Meyer
Prosecuting Attorney, Perry County
17 North Main
Perryville, Missouri 63775



Dear Mr. Meyer:

This is in response to your request for an opinion on the fol-
lowing question:

Shall the Presiding Judge of the County Court be
considered an ex-officio member of the Board of Educa-
tion under Section 162.301(3), RSMo [Supp. 1981], so
that the Presiding Judge may not contract with the
Board of Education and receive payment for services
rendered.

Section 162.261, RSMo Supp. 1981, provides:

The government and control of a six-director school
district, other than an urban district, is vested in a
board of education of six members, who hold their office
for three years, except as provided in section 162.241,
and until their successors are duly elected and qualified.
Any vacancy occurring in the board shall be filled by the
remaining members of the board; except that if there are
more than two vacancies at any one time, the county court
upon receiving written notice of the vacancies shall fill
the vacancies by appointment. The person appointed shall
hold office until the next municipal election, when a di-
rector shall be elected for the unexpired term.

Section 162.301, RSMo Supp. 1981, provides:

1. Within seven days after the election of the first
school board in each six-director district, other than an
urban district, and within seven days after each annual

The Honorable John G. Meyer

election, the board shall meet. The newly elected members shall qualify by taking the oath of office prescribed by article VII, section 11, of the Constitution of Missouri.

2. The board shall organize by the election of a president and vice president, and the board shall, on or before the fifteenth day of July of each year, elect a secretary and a treasurer, who shall enter upon their respective duties on the fifteenth day of July. The secretary and treasurer may be or may not be members of the board. No compensation shall be granted to either the secretary or the treasurer until his report and settlement are made and filed or published as the law directs.

3. A majority of the board constitutes a quorum for the transaction of business, but no contract shall be let, teacher employed, bill approved or warrant ordered unless a majority of the whole board votes therefor. When there is an equal division of the whole board upon any question except the reemployment of a teacher, the presiding judge of the county court, if requested by at least three members of the board, shall cast the deciding vote upon the question, and for the determination of the question shall be considered a member of the board. (Emphasis added.)

In our view, the presiding judge of the county court is not a regular member of the board or an ex-officio member of the board in the normal sense under Section 162.301.3 but is only considered a member of the board for the purpose of casting the deciding vote when properly requested to do so.

Section 105.458, RSMo, prohibits members of a governing body of a political subdivision from performing services for such political subdivision for any consideration other than official compensation. Because penal statutes are strictly construed, matters or things which are not clearly included cannot be brought within the operation of such statutes by construction. State v. Reid, 28 S.W. 172 (Mo.Supp. 1894). Therefore, Section 105.458 would not apply to the presiding judge in the situation you have presented.

However, the presiding judge should not cast any vote on any question in which he is directly or indirectly interested.

CONCLUSION

It is the opinion of this office that the presiding judge of the county court is not a regular member of a school district board

The Honorable John G. Meyer

under Section 162.301.3, RSMo Supp. 1981, and, therefore, Section 105.458, RSMo, is not applicable to the presiding judge.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

December 28, 1981

OPINION LETTER NO. 180
(corrected)

The Honorable Jack Goldman
Representative, District 102
8505 Elsa
Affton, Missouri 63123



Dear Representative Goldman:

This opinion is in response to your questions asking:

1. Is a for profit apartment building a commercial facility within the meaning of Chapter 349 of the Revised Statutes of Missouri?
2. Is the for profit construction of an apartment building that will be operated on a not-for-profit basis after the period of construction a "commercial facility" within the meaning of Chapter 349, Revised Statutes of Missouri?

Generally, Chapter 349 provides for the organization of Industrial Development Corporations within counties and municipalities to develop commercial, industrial, agricultural or manufacturing facilities. In 1980, the 80th General Assembly passed C.C.S.H.C.S.H.B. 1582 and 1277 which repealed and reenacted, inter alia, Section 349.010, which now provides:

- (4) "Project" means the purchase, construction, extension and improvement of plants, buildings, structures, or facilities, whether or not now in existence, including the real estate, used or to be used as a factory, assembly plant,

The Honorable Jack Goldman

manufacturing plant, processing plant, fabricating plant, distribution center, warehouse building, waterborne vessels excepting commercial passenger vessels for hire in a city not within a county built prior to 1950, office building, commercial or agricultural facility, or facilities for the prevention, reduction or control of pollution. Included in all of the above shall be any required fixtures, equipment and machinery. Excluded are facilities designed for the sale or distribution to the public of electricity, gas, water or telephone, together with any other facilities commonly classified as public utilities. Projects of a municipal authority must be located wholly within the incorporated limits of the municipality except that such projects may be located outside the corporate limits of such municipality and within the county in which the municipality is located with permission of the governing board of the county. Projects of a county authority must be located within an unincorporated area of such county except that such projects may be located within the incorporated limits of a municipality within such county, when approved by the governing body of the municipality. (language added by C.C.S.H. C.S.H.B. 1582 and 1277, 80th General Assembly, emphasized.)

Our task in rendering this opinion is to seek the intent of the legislature. This is the cardinal rule of statutory construction. State ex rel. Ashcroft v. Union Electric Co., 559 S.W.2d 216 (Mo.App. 1977). Additionally, we must assign the words employed by the legislature their plain, ordinary meaning. Beiser v. Parkway School Dist., 589 S.W.2d 277 (Mo. banc 1979).

Thus, of central import to the resolution of this opinion is the intent of the legislature in amending Section 349.010 to include commercial facilities. Courts generally have afforded the term "commercial" both a broad and a narrow meaning.

The term "commercial" in its broad sense comprehends all business, while in a narrow sense it includes only those enterprises engaged in buying and selling goods and services. Reiser v. Meyer, 323 S.W.2d 514, 521 (Mo.App. 1959).

The Honorable Jack Goldman

See also State ex rel. State Highway Commission v. Heil, 597 S.W.2d 257, 260 (Mo.App. 1980); Lanski v. Montealegre, 104 N.W.2d 772 (Mich. 1960); 15A C.J.S. Commercial §1.

There exists a line of cases which holds that apartment buildings are commercial enterprises. In Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission, 64 A.2d 500 (Pa. 1949), the Pennsylvania Superior Court held that an eleven unit apartment building was commercial for purposes of obtaining a commercial service connection under the Philadelphia Suburban Water Company's tariff. That court stated:

Only by a narrow construction of the word "commercial" could it be decided that the operation of an apartment development like Colonial's is not a commercial activity. Id. at 503.

In District of Columbia v. Wardell, 122 F.2d 202 (D.C.App. 1941), the court held that rents collected from the operation of apartment houses "were derived from a 'business * * * or commercial activity' within the meaning of the [District of Columbia] Revenue Act." Id. at 203.

More recently, the Supreme Court of Vermont, in Lewis v. Town of Brandon, 313 A.2d 673 (Vt. 1973), held that an apartment building was commercial property, stating:

The primary purpose of commercial property is to produce an income of profit for the owner. The primary purpose of owning apartment buildings is to realize an income or profit from rentals. The property owned by the plaintiffs [apartment owners] constitutes commercial property Id. at 676.

In State ex rel. Jardon v. Industrial Development Authority of Jasper County, 570 S.W.2d 666 (Mo. banc 1978), the Missouri Supreme Court held that the financing of the construction of an office building through industrial revenue bonds was permitted by Chapter 349. The court expressed the legislature's purpose in permitting the establishment of industrial development corporations as being, inter alia, "improved employment and stimulation of the economy. . . ." Id. at 675.

We believe that the cases cited, read in the light of the Missouri Supreme Court's broad interpretation of Chapter 349 to give effect to the legislature's intention, in Jardon, supra, are persuasive. Accordingly, it is our opinion that a for profit apartment building is a commercial facility within the meaning of Chapter 349.

The Honorable Jack Goldman

With regard to your second question, we understand that the construction of an apartment building for profit, financed with bonds issued by an industrial development corporation, is contemplated. Upon completion of the construction, the developer will sell the complex to a public housing authority at a profit to the developer, provided the completed structure is satisfactory to the housing authority. The public housing authority is a not-for-profit entity.

We believe that the ultimate purpose for which a commercial facility is constructed is irrelevant to its characterization as a commercial facility and, therefore, its ability to qualify for financing under Chapter 349.

In In Re Spring Valley Development, 300 A.2d 736 (Me. 1973), the Maine Supreme Court predicated its determination of commercial on the purpose of the activity.

We think that the use of the word "commercial" was intended to describe the motivation for the development and not the type of activity to be performed on the property after it is developed. (Emphasis added). Id. at 742.

The developer's motivation in the fact situation you pose is to return a profit. Should the public housing authority fail to purchase the apartment, the developer may operate the project himself or sell it to a profit-oriented entity. We certainly cannot predict the future. Therefore, having determined that an apartment is a commercial facility, we conclude that its future use is not determinative of the ability of an industrial development corporation to finance it under Chapter 349.

Very truly yours,


JOHN ASHCROFT
Attorney General

Attorney General of Missouri

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November 17, 1981

OPINION LETTER NO. 181

The Honorable George E. Murray
Senator, District 26
763 South New Ballas Road
St. Louis, Missouri 63141



Dear Senator Murray:

This letter is in response to your question asking whether a constitutional charter city may choose as a city depositary an institution outside of the city limits. You have also stated that there are no restrictions or limitations in the city charter with respect to the selection of such a depositary.

We find no statutory provision restricting a constitutional charter city from selecting a depositary outside of the city limits. Under Section 19(a) of Article VI of the Missouri Constitution such a charter city has all the powers which the General Assembly of the state has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute.

Therefore, it is our view that a constitutional charter city may by ordinance provide for the selection of a depositary in Missouri outside of the city limits.

Very truly yours,

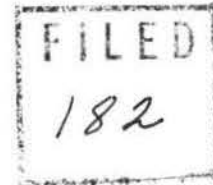
John Ashcroft

JOHN ASHCROFT
Attorney General

November 13, 1981

OPINION LETTER NO. 182

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

Pursuant to Section 116.160, RSMo Supp 1980, I have prepared a ballot title for the referendum on Senate Substitute for House Bill No. 695, Eighty-First General Assembly. The ballot title is:

"Amends law relating to certain commercial motor vehicles and provides for an increase in the maximum fees, length and weight for certain commercial vehicles operated on or within five miles of interstate and primary highways."

Yours very truly,

JOHN ASHCROFT
Attorney General

JUDGES: A judge who requests and
JUDICIAL RETIREMENT: receives a refund of re-
STATE EMPLOYEES' RETIREMENT SYSTEM: tirement contributions as
provided in subsection 4
of Section 476.585, RSMo Supp. 1981, will not suffer any reduction
or elimination of benefits on his or her own behalf or on behalf
of a spouse under the provisions of Sections 476.535, 476.540 and
476.545 which they would otherwise be eligible to receive.

December 21, 1981

OPINION NO. 183

The Honorable Edwin L. Dirck
Senator, District 24
221 State Capitol Building
Jefferson City, Missouri 65101



Dear Senator Dirck:

This official opinion is issued in response to your request
which reads as follows:

As you may be aware, Section 476.585
of House Committee Substitute for House
Bills Nos. 835, 53, 591 and 830, provides
for a return of accumulated retirement
contributions not previously refunded to
judges. Subsection 4 of that section pro-
vides in part: "Such refund of contri-
butions and interest shall not in any way
change any benefits or rights to which
the judge may be entitled." Sections
476.535, 476.540, and 475.545, RSMo, pur-
port to reduce or eliminate certain retire-
ment benefits if a judge seeks a return of
accumulated retirement contributions. A
question has arisen as to how these sec-
tions should be interpreted in light of
the new Section 476.585. If a judge seeks
and receives a refund of retirement contri-
butions as provided by Section 476.585, does
he or she or a surviving spouse thereby
suffer any reduction or elimination of bene-
fits under the various judicial retirement
provisions, particularly Sections 476.535,
476.540 and 476.545, RSMo?

The Honorable Edwin L. Dirck

Sections 476.535, 476.540 and 476.545 were first enacted by the 76th General Assembly and became effective September 28, 1971. See Laws of Missouri 1971, p. 453, §§ 5-7.

Subsection 2 of Section 476.535 provides that if a person dies who has served in this state an aggregate of 12 years, continuously or otherwise, as a judge, and who, after September 28, 1971, ceased or ceases to hold office by reason of the expiration of his term or voluntary resignation, but who has not retired under the provisions of this section, nor withdrawn his contributions, retirement compensation shall be paid in monthly installments to his beneficiary in the amount equal to fifty percent of the amount of retirement compensation provided in Section 476.530. Subsection 1 of Section 476.535 was amended in 1974 and now provides in pertinent part that on and after August 13, 1974, in the event that a person who is serving as a judge as defined in Section 476.515 dies, retirement compensation shall be paid in monthly installments to his beneficiary in the amount equal to fifty percent of the amount of the retirement compensation provided in Section 476.530 regardless of the period of his judicial service, except that the retirement compensation so provided shall be reduced if the judge could not have served 12 years because of the mandatory retirement provisions in Article V, Section 30, of the Missouri Constitution.

Section 476.540 provides that any person ceasing to hold office as a judge for any reason other than death or retirement may make written application to the Commissioner of Administration for a refund of his contributions under Sections 476.515 to 476.565, and that any person receiving such refund thereby waives all rights to retirement compensation under Sections 476.515 to 476.565.

Section 476.545 provides that any judge who has served less than 12 years and is otherwise qualified may elect not to have his contributions refunded and may retire at age 65, or thereafter, with a reduced benefit.

Sections 476.575, 476.580, 476.585, 476.590 and 476.595, RSMo, were first enacted by the 78th General Assembly and became effective on September 1, 1976. See Laws of Missouri 1976, p. 639, §§ 1-5. Pursuant to Section 476.580, the Missouri State Employees' Retirement System now administers the retirement benefits of all judges provided for in Section 476.515 to 476.565, and such benefits are paid monthly out of the general revenue of the State of Missouri.

Subsection 1 of Section 476.585 provided that no payroll deductions should be made from the compensation of any judge for retirement benefits after September 1, 1976. Subsection 2 provided

The Honorable Edwin L. Dirck

that any judge holding office on September 1, 1976, who thereafter retired, should be paid by the Commissioner of Administration the total amount of contributions paid by him under the provisions of Section 476.525, together with the interest as computed by the Board of Trustees of the Retirement System, and this amount should be in addition to any retirement benefits to which he was entitled. Subsection 3 of Section 476.585 provided that when a judge in office died on or after September 1, 1976, the Commissioner of Administration should pay to such beneficiary as the judge may have designated in writing, or to his estate if no beneficiary be designated, an amount equal to the total amount of contributions paid by him under the provisions of Section 476.525, together with interest as provided in subsection 2 of said section.

House Committee Substitute for House Bills Nos. 835, 53, 591 and 830 of the 81st General Assembly repealed certain statutory provisions relating to retirement systems of state officers and employees and enacted in lieu thereof 52 new sections relating to the same subject. Section 476.585 was repealed and reenacted in the foregoing legislation. The first three subsections of Section 476.585, RSMo Supp. 1981, are almost identical to the corresponding subsections of former Section 476.585. However, there was added a new subsection 4 which reads as follows:

Within ninety days of the effective date of this act, when a judge, as defined in Section 476.515, requests in writing, the board shall pay to that judge from general revenue all accumulated contributions made through September 1, 1976, and not previously refunded, plus credited interest to the date the payment is made by the board. Such refund of contributions and interest shall not in any way change any benefits or rights to which the judge may be entitled. (emphasis added)

Section B of the foregoing legislation states that subsection 4 of Section 476.585 shall become effective on October 1, 1981.

With the foregoing legislative history in mind, there is authority for the proposition that statutes in pari materia must be read and construed together in order to keep all provisions of law on the same subject in harmony so as to work out and accomplish the central idea and intent of the lawmaking branch of state government. State ex rel. Day v. County Court of Platte County, 442 S.W.2d 178 (Mo.App. 1969). Further, in determining legislative intent, it has been pointed out that since the legislature is

The Honorable Edwin L. Dirck

presumed to know the prior construction of the original Act, an amendment substituting a new phrase for one previously construed, generally indicates that a different interpretation be given the new phrase as the old phrase as interpreted no longer expresses the legislative will. Salitan v. Carter, Ealey and Dinwiddie, 332 S.W.2d 11 (Mo.App. 1960). Lastly, there is ample authority for the proposition that in repealing one statute and substituting another a court must assume that the General Assembly intended something by the repeal of the old and the enactment of the new statute in lieu of the old statute and that the latter statute supercedes the earlier Act that was repealed. Pogue v. Swink, 261 S.W.2d 40 (Mo. 1953).

As a result, it is our view that the legislature did not intend that a judge who requests and receives a refund of retirement contributions as provided for in subsection 4 of Section 476.585, RSMo Supp. 1981, should suffer any reduction or elimination of benefits on his or her own behalf or on behalf of a spouse under the provisions of Sections 476.535, 476.540 and 476.545 which they would otherwise be eligible to receive. This interpretation is consistent with other provisions relating to the Missouri State Employees' Retirement System. See Section 104.366, RSMo Supp. 1981.

CONCLUSION

It is the opinion of this office that a judge who requests and receives a refund of retirement contributions as provided in subsection 4 of Section 476.585, RSMo Supp. 1981, will not suffer any reduction or elimination of benefits on his or her own behalf or on behalf of a spouse under the provisions of Sections 476.535, 476.540 and 476.545 which they would otherwise be eligible to receive.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Very truly yours,



JOHN ASHCROFT